83-1584

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GERALD W. BRUNNER, et al,
Petitioners,

vs.

NATIONAL STEEL CORPORATION, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BARRY LAINE
Counsel of Record
ANTHONY P. SGAMBATI II
DAVID ROLOFF
GREEN, SCHIAVONI, MURPHY,
HAINES & SGAMBATI CO., L.P.A.
400 Dollar Bank Building
P. O. Box 849
Youngstown, Ohio 44501
Telephone: (216) 743-5101
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether an employer that serves as the administrator, trustee and fiduciary of a retirement plan established under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001 et seq. which provides benefits in the event the company ceases operations, may require as a condition for selling its facilities to an employee created ESOP, an amendment to the retirement program which withdraws those benefits that would otherwise be triggered by the sale?

2. Whether an employer which is a plan fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001 et seq., is bound by the fiduciary standards set out in Section 404 of the Act, 29 U.S.C. Section 1104, when in the course of selling its facilities, the employer acts to withdraw plan benefits provided by the retirement program which would arise in the event of a sale?

3. Whether an employer that serves as the fiduciary of its retirement program violates the prohibited transactions sections of the Employee Retirement Income Security Act of 1974 (ERISA), set out in Section 406 of the Act, 29 U.S.C. Section 1106, when it arranges terms of sale under which the plan is deprived of employer contributions that would otherwise result from the sale?

4. Whether a union defendant in an action alleging, inter alia, unfair representation, is properly dismissed on a summary judgment, where the union has agreed with the employer to contract provisions which are violative of the Employee Retirement Income Security Act of 1974 (ERISA), and where the union has not moved for a summary judgment?

PARTIES APPEARING BEFORE THE COURT

Petitioners, Plaintiffs and Appellants respectively in the District Court and the Court of Appeals, are Gerald W. Brunner, Clarence Riffee, Norman Clark and James Hoge. Respondents, Defendants and Appellees respectively in the District Court and the Court of Appeals, are National Steel Corporation, the Independent Steelworkers Union, the Weirton Joint Study Committee, and the Pension Agreement Between the National Steel Corporation and the Independent Steelworkers Union.

In the proceedings before the Court of Appeals, this cause was consolidated with two other appeals captioned *Eugene R. Sutton, et al v. Weirton Steel Division of National Steel Corporation, et al,* Case Nos. 83-1567 and 83-2003, and *Edward Dhayer, et al v. Weirton Steel Division of National Steel Corporation, et al,* Case Nos. 83-1568 and 83-2004.[1] The Respondents listed above were also appellees in the *Sutton* and *Dhayer* appeals.

---

[1] The appellants in the *Sutton* appeal were Eugene R. Sutton, Raymond Ludewig, Paul D. Alexander, Anthony J. Angelo, John P. Barlas, Thomas V. Barnhouse, William Bell, Walter Birrell, Pete Brier, Camden Bumgarner, William D. Burch, Glenn L. Burdick, Robert F. Baldwin, Myers D. Campbell, Homer R. Cameron, Joseph Candal, Jr., Noel A. Cantin, Raymond Caparros, James W. Carducci, Milton Ceran, Herbert A. Chapman, William H. Chapell, Andrew Chicovic, Glenn L. Chivers, Henry H. Cooper, Vonlie Cooper, Frank V. Cybulski, George R. Danford, Donald Davidson, Ronald E. Davis, Carales L. Dawson, Carl G. Dulaney, Gerald D. Dennis, Richard W. Deenen, Frank E. DiPietro, Sr., Nicholas S. Dederick, Warren D. Dunlap, William H. Eastham, Merle H. Etheridge, Russell Evans, Andrew Evano, Donald A. Farmer, Kenneth E. Farmer, Cecil E. Faulk, Walter Fisher, Warren L. Flanagan, George C. Foldi, Sr., David H. Frantz, Edgar K. Gaumer, Paul A. Gerad, Robert A. Giannamore, Ralph Gorrell, Sr., Robert Gregson, Jr., Robert W. Hamilton, John W. Haney, Jr., Robert E. Haney, Charles M. Hayes, James E. Helton, Richard A. Hixenbaugh, James M. Hoffman, James A. Hoge, Howard D. Keenan, Roy E. King, Harold G. Huggins, Joseph G. Izzi, Stanley Janoski, Harry D. Jones, Edward J.

Klakos, Melvin Kostur, Stanley Krupinski, Daniel Kukich, James E. Laslo, Charles W. Latimer, Richard D. Law, Robert G. Lemasters, Lee W. Libengood, Joseph W. Lipan, Jr., James M. Livingston, Jr., John G. McClaskey, Dana C. McClelland, Benny McClosky, Charles McConnel, John J. McElwain, William J. McHugh, George J. McLaughlin, Charles E. Metz, John W. Milewsky, John H. Misch, Steven A. Modranski, Jr., Fred R. Moore, Roy Moorehead, Herbert D. Morris, George T. Murray, Louis Nagy, Sandino Q. Orsini, Roy R. Owens, Earl W. Patterson, Joseph A. Pasquarella, Stanley A. Pawlin, Albert A. Petrella, Dwain E. Poland, Ted F. Poling, Elwood L. Popish, Paul E. Pugh, John N. Hughes, Wendall Jones, Hilbert W. Pyles, Floyd C. Rabe, Richard K. Raineri, John P. Ralston, Frank (Francis) Rea, Odell Rector, Samuel E. Richards, Clemens Rocchio, James E. Ryan, Leslie W. Shuman, Edward G. Sembar, Clarence W. Sims, Edwin N. Sinila, Donald W. Smith, Dale Smith, George W. Smith, Jack H. Smith, Robert L. Smith, Victor Sogan, Robert L. Starkey, Rose Marie Starkey, Robert Still, Gary M. Straight, Floyd D. Swain, Eugene A. Sweitzer, Richard Toker, Herbert L. Utzler, Edwin R. Weaver, Thomas R. Wedlake, Raymond M. Wenzowski, Arden R. Westfall, Arthur C. Wharton, Stanley D. Willey, William W. Willoughby, R. W. Wilson, Thomas Winland, Frank B. Mateusiak, James L. Lesko, John J. Kuczykowski, Sydney E. Givens, Glen V. Cottrill, Leo R. Burton, Adrian Burnworth, James P. Burkett, Lawrence A. Rawson, Joe H. Radivoj, Jr., Byron L. Messer, Leslie T. Martin, Charles W. Baier, Harold E. Masters, Ray J. Williams, Thomas J. Wigner, Charles M. Tortis, William O. Jones, Alfonso J. Cilone, William J. Houser, Arthur E. Fernandez, John E. Wojcik, Anthony J. Pellegrino, James S. Clark, Charles R. Cunningham, Harold E. Willis, Robert D. Robinson, Ernest W. Fithyan.

The appellants in the *Dhayer* appeal were Edward Dhayer, Edward Bittner, Richard Blancato, James H. Browning, William R. Duncan, Jr., Domenic F. Frio, William F. Garrison, David R. Harbin, Robert E. Hess, Jerry G. Jones, Robert L. Jones, Lloyd A. Klages, Charles D. Murray, Charles Prince, William B. Riggs, Donald L. White, Francis Baier, Bernard A. Deku, Robert A. Deku, Danial T. Diamond, Joseph M. Dumbovich, Arthur E. Fernandez, Robert Edward Griffith, David F. Grimm, Patrick S. Gurrera, Bruce K. Lemaster, Albert L. Monseau, Joseph Petrelle, Ennio Rasicci, Charles E. Wagner, John E. Wojcik.

TABLE OF CONTENTS

Appendix:

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

In The

Supreme Court of the United States

October Term, 1983

Gerald W. Brunner, et al,
Petitioners,

vs.

National Steel Corporation, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Gerald W. Brunner, Clarence Riftee, Norman Clark and James Hoge, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-captioned matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 724 F.2d 406 and is reproduced in the Appendix at A-1.

The opinion of the United States District Court for the Northern District of West Virginia is reported at 567 F. Supp. 1184 and is reproduced in the Appendix at A-36.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1983. The jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS AND CIVIL RULE INVOLVED

This cause involves Sections 404 and 406 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sections 1104 and 1106, Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. Section 185, and Rule 56 of the Federal Rules of Civil Procedure. These are set forth in the Appendix at A-52 et seq.

STATEMENT OF THE CASE

Introduction

When this action was commenced, the National Steel Corporation owned and operated a facility in Weirton, West Virginia known as the Weirton Steel Division. The Weirton Steel Division became unprofitable and a decision was made by National Steel to divest itself of the Weirton facility.

Such a divestiture, however, would give rise to extensive pension liabilities under a retirement program administered by National Steel. To avoid these liabilities, National Steel Corporation devised and implemented a plan to divest itself of the unprofitable Weirton facility in a manner which would allow the company to avoid pension and severance obligations. The efforts of National Steel Corporation to avoid these pension and severance obligations gave rise to this action.

This proceeding was commenced by four employees of National Steel Corporation, Weirton Steel Division, in the United States District Court for the Northern District of West Virginia. The jurisdictional basis for the action was Section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1132, and Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185. The statutes are set out in the Appendix at A-52, 67. Petitioner employees sought to prevent National Steel from depriving them and similarly situated Weirton Steel Division employees of severance and

retirement benefits that would result from a sale of the Weirton facility.[2]

Factual Background

On March 2, 1982, the National Steel Corporation announced its intention to sell the Weirton Steel Division. The company statement continued that discussions would be commenced with unions representing employees of the Weirton Steel Division for the purpose of arranging an employee buy-out of the facility.

At the time of the announcement, National Steel Corporation and the Independent Steelworkers Union were signatories to a collective bargaining agreement and a pension agreement. The collective bargaining agreement provided severance pay benefits when the company "decides to close permanently a department or discontinue permanently a substantial portion thereof and terminate the employment of individuals. . ."

The Pension Agreement between the Weirton Steel Division of National Steel Corporation and the Independent Steelworkers Union established retirement rights and benefits

---

[2] In addition to the National Steel Corporation, Petitioner employees named as Defendants the Independent Steelworkers Union, the collective bargaining representative of employees at the Weirton Steel Division, the Weirton Joint Study Committee, which participated in fashioning the terms of sale, and the Pension Agreement Between the National Steel Corporation and the Independent Steelworkers Union.

Two other actions were filed in the District Court for the Northern District of West Virginia by aggrieved employees of National Steel's Weirton Steel Division. One hundred seventy-six union employees were named as plaintiffs in an action styled *Sutton, et al. v. Weirton Steel Division of National Steel Corporation, et al.*, and thirty-one non-union employees commenced an action captioned *Dhayer, et al. v. Weirton Steel Division of National Steel Corporation, et al.* The actions were consolidated with this proceeding at the district court and appellate court levels, and the employees in the *Sutton* and *Dhayer* actions have also filed a Petition for Certiorari.

for employees at the Weirton Steel Division, including Petitioners. The Pension Agreement conferred benefits to otherwise eligible employees in the event of a plant shutdown. Specifically, under the Pension Agreement, employees "whose continuous service is broken by reason of a permanent shutdown of a plant" and employees who are not "offered suitable long-term employment" are eligible for retirement benefits if they satisfy the age and service requirements. Approximately 3,000 employees at the Weirton Steel Division were eligible for these benefits. Employees who retire under these provisions receive their regular pension and a $400.00 per month supplement.

To provide for these and other pension benefits, National Steel Corporation established a pension plan known as Plan 001 of the National Steel Corporation Retirement Program. The plan, in effect at the time of the National Steel announcement of its intention to divest itself of the Weirton facility, provided shutdown retirement benefits for employees of the Weirton Steel Division in accordance with the pension agreement and the collective bargaining agreement.

The summary plan description required by the Employee Retirement Income Security Act of 1974 identifies National Steel Corporation as the administrator and trustee of the plan. It provides that the National Steel Corporation:

> "...is the plan administrator, trustee and agent for service of legal process under the plan... The plan administrator has the responsibility to manage the plan and act in the interest of plan participants and must carry out its duties in accordance with the fiduciary standards of ERISA."

Though a plan fiduciary, National Steel Corporation acted to deprive plan participants of the shutdown retirement provisions promised in the pension plan.

The vehicle to implement National Steel's twin objectives of unloading the unprofitable Weirton facility and avoiding shutdown benefits attendant to such a divestiture was to arrange an

employee buy-out of the facility and to condition such sale upon assurances that it would not trigger shutdown retirement benefits. Accordingly, managerial employees of the Weirton Steel Division met with union representatives to form what later became known as the Weirton Joint Study Committee. Though the Weirton Joint Study Committee included managerial employees of National Steel Corporation, the Committee proceeded to negotiate terms of sale with National.

Among the terms negotiated were the severance and pension rights of the Weirton employees. An actuarial study of National's pension obligations was undertaken, and the study concluded that if National were required to pay shutdown benefits, its pension liabilities would increase by more than Three Hundred Million Dollars ($300,000,000.00). A National spokesman acknowledged that the liability was a "grave concern" of the company.

Accordingly, National imposed as a condition for sale an agreement to relinquish the severance and shutdown retirement benefits provided in the pension plan. The Joint Study Committee and the union acquiesced in and accepted National's terms and agreed to relinquish the severance and shutdown retirement benefits that would otherwise be triggered by a sale.

Thus, the Agreement reached between National Steel Corporation and the Weirton Joint Study Committee specified that the sale of the Weirton facility would not give rise to shutdown retirement benefits. Under the Agreement, National's liability for shutdown retirement benefits subsequent to the sale would arise only in the event the employee owned company which purchased the Weirton facility ceased operations within five years, and, absent such an occurrence, the responsibility for paying shutdown retirement benefits would be assumed by the newly created and financially insecure ESOP which had been established to purchase the failing Weirton Steel Division. The Agreement further specified that National would not pay employees severance benefits in connection with the sale.

The Agreement therefore permitted National Steel to divest itself of the Weirton facility without incurring shutdown retirement benefits.

District Court Proceedings

The complaint of Petitioner employees principally relied upon the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001 et seq. Specifically, the employees asserted that National Steel's conduct constituted a breach of its fiduciary obligations imposed by Section 404 of the Act, 29 U.S.C. Section 1104, and violated the prohibited transaction provision of ERISA contained in Section 406 of the Act, 29 U.S.C. Section 1106. An unfair representation claim was stated against the Independent Steelworkers Union as a result of the union's abandonment of its statutory duties to the Weirton Joint Study Committee, which included managerial employees, and the union's acquiescence in the withdrawal of its members' contract and pension rights.

The employees sought a preliminary injunction prohibiting Respondents from engaging in any activity or participating in any transaction which constitutes a breach of fiduciary obligation or a prohibited transaction under the Employee Retirement Income Security Act of 1974, or a breach of the union's duty of fair representation. On April 28, 1983, the court denied the motion for injunctive relief and the employees took an appeal from that order.

During the course of the hearing on the preliminary injunction, the Independent Steelworkers Union and the Weirton Joint Study Committee filed a motion to dismiss. The Independent Steelworkers Union claimed, inter alia, that it did not breach its duty of fair representation. After the issues were briefed, the court, on June 3, 1983, granted a portion of the motion but specifically held that the unfair representation allegations against the union did state a claim and would not be dismissed.

On May 24, 1983, approximately six weeks after the complaint was filed and prior to any discovery, Respondents National Steel Corporation and the Pension Agreement filed a motion for summary judgment. The employees opposed the motion on the merits, and submitted, inter alia, the affidavit of David Kass, an actuary. The Kass affidavit described contributions that would be received by the plan from National to defray payments for shutdown retirement benefits as assets of the plan.

In addition, the employees filed a Rule 56(f) motion to defer consideration of the summary judgment motion until the necessary discovery was completed. Petitioners had filed Interrogatories and Requests for Production, and urged the court to defer ruling on the pending summary judgment motion until such discovery could be obtained.

By order dated July 11, 1983, the trial court granted the motion for summary judgment with respect to the major claims asserted in the complaint and denied the motion to defer ruling until further discovery could be had. App. at A-1. For purposes of the summary judgment motion the court assumed that "avoiding future pension benefits was the sole motivation of National." App. at A-24. The lower court concluded, however, that in arranging terms of sale that would affect pensions, National's conduct would not be measured by ERISA standards. With respect to the moving Defendants, the court concluded that National Steel Corporation and the Pension Agreement did not breach their fiduciary duties under ERISA or engage in any prohibited transactions as defined by the Act.

The court order also granted summary judgment with respect to the unfair representation claims against the union arising out of the union's participation in the sale. The union had not sought a summary judgment, and the court did not inform the parties that it would decide claims against the union in the course of ruling on the company's motion for summary judgment.

The court labelled its ruling a partial summary judgment. Thereafter, Petitioners moved the court to reconsider its prior order and permit them to engage in further discovery on the ERISA issues, or, in the alternative, to certify an interlocutory appeal pursuant to 28 U.S.C. Section 1292. Respondents moved the court to enter a final order with respect to the moving Defendants pursuant to Federal Rule of Civil Procedure 54(b). On September 15, 1983, the court denied the employees' motion, granted Respondents' motion, and entered final judgment as to certain claims and determinations. App. at A-47.

Petitioners duly filed a notice of appeal. The appeal from the issuance of the final judgment as to certain claims was consolidated with the appeal taken from the denial of the preliminary injunction.

The Opinion Of The Court Of Appeals

The Court of Appeals, in an opinion dated December 30, 1983, affirmed the District Court. App. at A-36. The appellate court acknowledged that National was a fiduciary and required to adhere to fiduciary standards established in ERISA. App. at A-40. However, the reviewing court held that National could withdraw the benefits without violating ERISA, and that the changes in the pension plan "are not to be reviewed by fiduciary standards." App. at A-42. The appellate court further held that the plant shutdown liability was not an asset of the plan and that the prohibited transaction provisions of ERISA were not violated by the transaction.

Finally, the appellate court upheld the trial court's finding that the union did not breach its duty of fair representation. Conceding the procedural irregularity of granting summary judgment to a party who had not moved for summary judgment, the appellate court concluded that such error was harmless.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Court Below Decided Questions Of Widespread Impact Affecting The Integrity Of Retirment Plans, The Rights Of Participants In Those Plans, And The Obligation Of Employer-Fiduciaries To Plan Participants. The Decision Below Raises Issues Of First Impression That Have Not Been Addressed By This Court And Is Contrary To The Policies Giving Rise To And The Specific Provisions Of The Employee Retirement Income Security Act Of 1974 (ERISA).

1. In 1974 Congress enacted the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1001 et seq. The Act was intended to protect:

> "...the interests of participants in employee benefit plans...by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. Section 1001.

In *Shaw v. Delta Air Lines, Inc.,* - U.S. -, 77 L.Ed. 2d 490 (1983), this Court explained that "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." 77 L.Ed. 2d at 497.

The appellate court held, inter alia, that an employer which serves as an administrator, trustee and fiduciary of a pension plan, may, in the context of a sale of its assets, act to deprive plan participants of benefits. The appellate court reasoned that the fiduciary status of the employer did not prevent the employer from acting in its own self interest to relieve the company of extensive liabilities to the detriment of plan participants. The holding raises significant issues with widespread impact upon the integrity of retirement plans, the rights of par-

ticipants in those plans and the obligations of employer-fiduciaries to plan participants.

First, the decision below impacts upon numerous retirement plans. Since ERISA does not prohibit employer representatives from serving as fiduciaries, (see 29 U.S.C. Section 1108, set out in the Appendix at A-60), employers and employer representatives serve as trustees, administrators, or fiduciaries in many retirement programs. The Act enjoins a fiduciary to "...discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries...." 29 U.S.C. Section 1104. The issue presented here is the extent to which an employer fiduciary is bound by common law and statutory principles of fiduciary conduct in its efforts to withdraw imminent retirement benefits in the context of a sale of its facilities.

The appellate court held that the employer fiduciary had no fiduciary obligations with respect to the transaction and could act to relieve itself of pension obligations unburdened by the strictures of ERISA. The holding has an obvious and apparent impact upon those retirement plans in which an employer or an employer representative serves as a fiduciary. Guidance from this Court is appropriate to clarify and define the rights of plan beneficiaries and the obligations of employer fiduciaries. This alone would warrant review of the unprecedented holding below that an employer-fiduciary may act to deprive empoyees of imminent benefits.

Second, many retirement plans feature provisions conferring benefits upon plant closure or the cessation of operations. The issue of an employer's responsibility as a plan fiduciary arises here in the context of a sale of a steel facility. This is an era of corporate reorganization, and the question of an employer fiduciary's responsibility could arise in other factual settings such as a plant closure, merger, or acquisition. The issue presented here will likely reoccur and a definitive decision by this Court is appropriate.

2. Title I of ERISA establishes standards of conduct for plan fiduciaries and prohibits fiduciaries from engaging in certain transactions. Those provisions are at the heart of ERISA and constitute a basic and vital component of the Act. Though this Court has considered ERISA in a variety of contexts, this Court has not yet addressed the issues raised by this Petition.[3] The obligation of a fiduciary employer to comply with fiduciary standards and the reach of the prohibited transaction provisions of ERISA are important matters of federal law which have not been addressed by this Court and which merit this Court's review.

3. On the merits, the opinion below is contrary to the provisions of ERISA, and the policy considerations giving rise to that Act. The court below did not properly construe and apply Sections 404 and 406 of the Act, 29 U.S.C. Sections 1104 and 1106. A review of those provisions and applicable law establishes that the holding below is contrary to the policies underlying ERISA and the specific provisions of the Act.

a. Section 404 of ERISA

Section 404 of ERISA, 29 U.S.C. Section 1104, App. at A-56, contains the "central and fundamental obligation imposed on

---

[3] See, e.g., *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359 (1980), which concerned the vested benefit provisions of ERISA, and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), and *Shaw v. Delta Air Lines, Inc., supra*, which involved the preemption provisions of ERISA. In *National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322 (1981), discussed in detail, *infra*, this Court did consider the fiduciary provisions of ERISA in the context of determining whether an employer appointed trustee of a benefit trust fund is a management representative for collective bargaining purposes under the National Labor Relations Act. While the *Amax* decision did refer to the fiduciary provisions of ERISA, the case did not involve a claimed breach of fiduciary standards or an alleged prohibited transaction—the issues presented by this Petition.

fiduciaries by ERISA...", *Evans v. Penn,* 587 F.2d 453, 457 (10th Cir. 1978). That statute, in pertinent part, provides:

> "...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries...".

National Steel did not adhere to the fiduciary standards set out in Section 404 of ERISA. National Steel, though plan administrator, trustee and fiduciary, set in motion a scheme to relieve itself of pension liabilities to the detriment of the participants of the plan. National did not act in the interest of the participants and beneficiaries—as enjoined by Section 404—but rather pursued its own interest of avoiding liability. As a result of the company's actions, the participants are to be denied shutdown retirement benefits upon sale, and, absent a complete shutdown within five years, the right to such benefits subsequent to the sale is to be left to the new employee owned company which would be much less able to pay shutdown benefits than the established National Steel. National, as a plan fiduciary, did not act in the interest of participants, and its conduct was violative of Section 1104.

The appellate court recognized that National Steel is a fiduciary and must act in accordance with fiduciary standards established in ERISA. The court concluded, however, that in arranging the terms of sale which would affect pensions, National Steel was not required to act in the interest of participants and beneficiaries, and that the provisions of Section 1104 were not implicated by National Steel's conduct.

The decision below is at odds with the purpose and intent of ERISA. Two clear policies underlying the Act and evident from the language chosen by Congress were to insulate the retirement

fund from the employer and to insure that plan fiduciaries act in furtherance of participants and beneficiaries. These critical policy interests were not served by the decision below.

In *National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322 (1981), this Court considered whether an employer appointed trustee of a benefit trust fund was a management representative for collective bargaining purposes under the National Labor Relations Act. This Court held that such a trustee was not to be viewed as a management representative since he held a fiduciary status toward the fund and its members. The Court explained that "...the fiduciary requirements of ERISA specifically insulate the trust from the employer's interest." 453 U.S. at 333. This Court reviewed those sections which accomplish that purpose:

> "Except in circumstances involving excess contributions or termination of the trust, 'the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.' Section 403(c)(1), 29 U.S.C. Section 1103(c)(1). Finally, Section 406(a)(1)(E) prohibits any transaction between the trust and a 'party in interest,' including an employer... In sum, ERISA vests the 'exclusive authority and discretion to manage and control the assets of the plan' in the trustees alone, and not the employer or the union. 29 U.S.C. Section 1103(a)." 453 U.S. at 333.

To insulate the fund from the employer, and insure that it is administered on behalf of plan participants, Congress required fiduciaries to conform to certain standards. "ERISA essentially codified," this Court explained, "strict fiduciary standards" for employee benefit fund trustees. 453 U.S. at 332. This Court elaborated upon those standards in the course of the opinion:

"...a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. Restatement (Second) of Trusts Section 170(1) (1957)); 2 A. Scott, Law of Trusts Section 170 (1967). To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.' *Meinhard v. Salmon*, 249 NY 458, 464, 164 NE 545, 546 (Cardozo, C.J.). A fiduciary cannot contend 'that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.' *Woods v. City National Bank & Trust Co.*, 312 US 262, 269, 85 L.Ed. 820, 61 S.Ct. 493." 453 U.S. at 329, 330.

Here, National Steel, though administrator, trustee and fiduciary, acted to deprive beneficiaries of shutdown retirement benefits that would have otherwise been required. The company acted solely in its own interest to the clear detriment of the plan participants who were to be denied benefits because of the company's conduct. Thus, the opinion below squarely conflicts with the underlying policies of ERISA. Neither the reasoning nor the authority cited by the appellate court justifies this departure from the Act.

First, in rejecting Petitioners' ERISA claims, the lower court argued that the shutdown benefits were not vested. The court suggested that since they were not vested some lesser fiduciary duty flowed with respect to those benefits. This clearly is not the case since ERISA protects plan beneficiaries and not specific benefit programs. Nothing in the Act can be read as limiting fiduciary standards to vested benefits or relegating shutdown retirement benefits to some lesser standards of fiduciary duty. Indeed, it should not go unnoticed that the only reason the benefits will not vest is because of National's coercive conduct and insistence upon an amendment as a condition of sale.

Petitioners and other similarly situated employees worked many years to obtain eligibility for shutdown benefits. On the very eve those benefits were to be realized, National changed the rules of the game to deny eligible Weirton Division employees benefits they worked for and earned. Such conduct by a fiduciary is clearly not permissible under the Act.

Petitioners' position is illustrated by the decision in *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (Mo. 1979), opinion after trial sub nom *Dependahl v. Falstaff Brewing Corp.*, 491 F. Supp. 1188 (Mo. 1980), modified on other grounds, 653 F.2d 1208 (8th Cir. 1981), cert. den. 454 U.S. 968 (1981). In *Calhoun*, an employer sought to require an amendment which would discontinue severance benefits. The court denied the employer defendant's motion for summary judgment, giving plaintiffs the opportunity to prove their allegations of a breach of fiduciary duty. The court quoted Section 1104(a), and ruled:

> "An amendment of the plan as alleged by plaintiff clearly violates this fiduciary duty. The fiduciaries are to guard the interests of the participants and beneficiaries, not those of the employer...
>
> To argue that [the] employer may terminate such plans at any time without violating the statute is clearly not supportable in the statutory language nor in equity." 478 F. Supp. at 361.

The *Calhoun* court held that where, prior to a large layoff of eligible employees, the employer had amended a severance plan to make such employees ineligible and then terminated the plan to recover surplus assets, the amendment of the plan violated the defendant's fiduciary duty to "guard the interests of the participants and beneficiaries." 478 F. Supp. at 361. In a subsequent decision issued after trial, the court reaffirmed that ERISA precluded an amendment "when made expressly in contemplation of actions which would otherwise entitle employees to the previously provided benefits." 491 F. Supp. at 1197. The

amendment to the plan here suffers the same vice as that condemned in *Calhoun*. The modification of the agreement by a fiduciary for the sole purpose of withdrawing a benefit which is imminent absent amendment gives rise to the protections of ERISA.

As with other fiduciaries, National was required to act in the best interests of plan participants. In *Donovan v. Bierwirth*, 680 F.2d 263 (2nd Cir. 1982), cert. den. - U.S. - , 74 L.Ed. 2d 631 (1983), the court considered the implications of Section 404(a)(1) in the context of a proposal to purchase company stock held by the corporation's pension fund. The *Donovan* court discussed the governing legal standards:

> "Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries. Restatement of Trusts 2d Section 170 (1959); II Scott on Trusts Section 170, at 1297-99 (1967) (citing cases and authorities); Bogert, The Law of Trusts and Trustees Section 543 (2d ed. 1978). This, in turn, imposes a duty on the trustees to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan." 680 F.2d at 271.

National, as a fiduciary, was enjoined by Section 404 of ERISA to act on behalf of plan participants. Its efforts to withdraw imminent benefits that would arise upon the sale are clearly contrary to its statutory obligation.

The court below relied upon this Court's decision in *United Mine Workers of America v. Robinson*, 455 U.S. 562 (1982).

Robinson cannot fairly be read as excluding collectively bargained pension agreements from compliance with Section 404 fiduciary standards.

Robinson simply holds that a court should not generally review the substantive terms of collectively bargained retirement provisions under 29 U.S.C. Section 186(c). However, this Court clearly and unequivocally added that such provisions "must comply with the detailed and comprehensive standards of the ERISA." 455 U.S. at 575. Where the employer is a fiduciary, those standards include the fiduciary obligation requirements set out in Section 404, as well as the prohibited transaction provisions of Section 406. Since the agreement at issue does contravene ERISA provisions, the lower court's reliance on the *Robinson* decision is misplaced.

The court below cited *Robinson* to support its conclusion that National's conduct was permissible collective bargaining. This Court, in *Amax,* explained the critical distinction between the conduct of a fiduciary and parties engaged in collective bargaining:

> "The atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by Section 302(c)(5) and ERISA, is wholly inconsistent with this process of compromise and economic pressure." 453 U.S. at 336.

Here, National Steel engaged in economic pressure arguably accepted in the collective bargaining context, but wholly inappropriate in the trust setting.

Rather than enforce the terms of the existing collective bargaining agreement, the company engaged in economic pressure to obtain employee relinquishment of the shutdown benefits. The parties had an agreement which National Steel insisted be amended prior to sale. The forced eleventh hour amendment to deprive employees of contractual benefits is hardly compatible with the salutary provisions of ERISA and the fiduciary standards contained in Section 404.

The agreed upon terms of sale not only deny participants shutdown benefits upon the sale, but relegate the future right of employees to receive those benefits to a new venture known as the Weirton Steel Corporation. All concede that the success of the new corporation is problematic. The transfer of liability from the solvent National Steel Corporation to a new enterprise further violated the fiduciary standards incorporated in ERISA.

b. **Section 406 of ERISA**

In addition to the general standards governing fiduciaries codified in 29 U.S.C. Section 1104, Congress also proscribed certain specific conduct by plan fiduciaries. In Section 406 of ERISA, 29 U.S.C. Section 1106, App. at A-58, Congress set out a detailed list of specifically prohibited transactions.

Section 1106(a) prohibits certain transactions involving a plan and a party in interest.[4] That section states, in applicable part:

> "Except as provided in section 408:
>
> > (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect— . . .
> >
> > (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . ."

Section 1106(b) prohibits certain conduct by a fiduciary. That section provides, in relevant part:

> "A fiduciary with respect to a plan shall not—
>
> > (1) deal with the assets of the plan in his own interest or for his own account,

---

[4] "Party in interest" is defined in 29 U.S.C. Section 1002(14). Under the definition, National is a party in interest, since it is a fiduciary and an employer of employees covered by an employee benefit plan.

> (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries . . ."

Referring to Section 1106 and related provisions, this Court stated in *Amax:*

> "The legislative history of ERISA confirms that Congress intended in particular to prevent trustees 'from engaging in actions where there would be a conflict of interest with the fund, such as representing any party dealing with the fund.' S. Rep. No. 93-383, pp. 31, 32 (1973). In short, the fiduciary provisions of ERISA were designed to prevent a trustee 'from being put into a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.' H.R. Conf. Rep. No. 93-1280, *supra,* at 309." 453 U.S. at 333, 334.

Here, National Steel announced that it would divest itself of the Weirton facility, thereby triggering shutdown retirement benefits. National then engineered a transaction for the purpose of relieving itself of such liability. National caused the plan to relinquish an asset in the form of payments required to be made to the plan for distribution to plan participants. Contrary to the explicit command of Section 1106, it acted in a transaction affecting the plan in a manner adverse to the plan beneficiaries.

The court below accorded Section 406 a grudging and narrow interpretation. The court concluded that no plan asset was involved[5] and that the plan itself did not engage in a transaction.

---

[5] In so holding, the court expressly declined to accept the affidavit of actuary David Kass which described the contributions that would be received by the company in the event of a plant shutdown as a plan asset. The court so held even though the Kass affidavit was the only evidence submitted on the issue.

The holding below is contrary to the intent and purpose of Section 406.

By focusing on whether actual money passed from the plan to the company, the court below misconceived the reach of Section 1106. The term "transaction", as used in Section 406 of ERISA, should be broadly construed to further the policies of the Act. *McDougall v. Donovan,* 552 F. Supp. 1206 (Ill. 1982). Congress plainly intended that the prohibited transaction provisions of the Act would be given an expansive scope. Referring to the substitute which emerge from Congress, the conference report stated that a "...prohibited transaction may occur even though there has not been a transfer of money or property between the plan and a party in interest..." [1974] U.S. Code Cong. & Adm. News 5089. As a result of National Steel's conduct, the plan was deprived of over Three Hundred Million Dollars ($300,000,000.00) that would be owed to the plan by the company in the event of a plant shutdown. National Steel engaged in a transaction which was adverse to the interests of the plan and plan beneficiaries—a course condemned by Section 1106.

II. The Issuance Of A Summary Judgment In Favor Of A Party Who Has Not Requested Or Moved For Summary Judgment, Entered Without Notice That The Court Would Consider The Parties' Rights On A Summary Judgment, Constitutes A Significant Departure From Settled Practice And Raises Serious Questions Of A Deprivation Of Due Process.

The Weirton Division employees' collective bargaining representative, the Independent Steelworkers Union, abrogated its statutory responsibilities by allowing the Weirton Joint Study Committee, which included managerial representatives, to negotiate terms of sale with National, and acquiesced in and agreed to the withdrawal of significant contract and pension

rights of its members. Accordingly, the complaint stated a claim for unfair representation. Before the merits of that claim could be established, it was dismissed by the trial court.

In the course of the decision granting National Steel's motion for summary judgment, the trial court ruled that the union did not breach its duty of fair representation in agreeing to the proposed terms of sale. The court so held despite the fact that it had earlier rejected Respondent Union's motion to dismiss the unfair representation claims, and in the absence of any motion for summary judgment by the union. The precipitous dismissal of the unfair representation claim against the union was improper since Petitioners could not have reasonably anticipated that the court would address the unfair representation claims in the course of ruling on National's motion for summary judgment. Civil Rule 56 expressly contemplates notice and an opportunity to defend, and the procedure followed by the trial court did not provide those fundamental rights.

The appellate court conceded the procedural irregularities, but concluded that the error was harmless. The affirmance of a summary judgment issued in the absence of a motion and without appropriate notice constitutes a significant departure from settled practice and warrants review by this Court.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Green, Schiavoni, Murphy, Haines
& Sgambati Co., L.P.A.

Barry Laine
Counsel of Record
Anthony P. Sgambati II
David Roloff
4th Floor, Dollar Bank Building
P.O. Box 849
Youngstown, Ohio 44501
Telephone: (216) 743-5101

Attorneys for Petitioners

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 83-0035-W

Eugene R. Sutton, et als,
Plaintiffs,

v.

Weirton Steel Division of National
Steel Corporation, et als,
Defendants.

Civil Action No. 83-0040-W

Gerald W. Brunner, et als,
Plaintiffs,

v.

National Steel Corporation,
et als,
Defendants.

Memorandum Opinion And Order

(Filed July 11, 1983)

This litigation grows out of the activities in connection with a proposed employee buy-out plan for the Weirton Steel Division of National Steel Corporation. Defendant National Steel has filed a motion for summary judgment and Plaintiffs in these cases and in Dhayer, et al, v. National Steel Corporation, et al., C.A. No. 83-36-W (N.D. W.Va. filed April 8, 1983) have filed a motion to delay consideration of National's motion pursuant to Rule 56(f), Federal Rules of Civil Procedure.

The Court greatly appreciates the efforts of all counsel in the exhaustive briefing of the issues presented.

The record in this litigation includes the pleadings and exhibits thereto; various affidavits offered in support of as well as in opposition to this motion and other previous motions; and evidence adduced in the form of testimony and documents at two hearings conducted on April 13, 1983, at the Elkins point of holding Court and on April 27-29, 1983, at the Wheeling point of holding court. From these matters of record, the Court finds the following facts are significant to the issues to be decided:

The Weirton Division of National Steel is the single largest private sector employer in the State of West Virginia. At one time, shortly after World War II, the Division had 16,000 workers, but the recent market for steel produced in the United States has reduced employment to some 11,000 in 1980, and about 7,000 currently.

In March, 1982, National Steel announced it would no longer make significant capital investment in its Weirton Division facilities, and that those facilities would be "downsized" over a period of time with a resulting level of employment of 1,200 to 2,000 workers in the late 1980's. The President of National Steel indicated the announcement was not an attempt to win labor cost concessions, but reflected the business decision of National to place its investment capital in other areas. In addition to National's announced intention to downsize the Weirton facilities, the options for the Division seemed to include finding a buyer for the Weirton mill who would be interested in future steel production or to devise a plan for an employee buy-out. National's management indicated a willingness to explore either of these options.

On the day of National's announcement, the International Steelworkers Union announced its intention to work with Weirton Division management to study the possibilities of employee buy-out, and, if feasible, to open negotiations with National

Steel. The Weirton Joint Study Committee was incorporated to study the employee buy-out option and coordinate related efforts. The Committee's board of directors consists of five representatives of the Weirton Division management team, twenty-one representatives of the Weirton Division management team, twenty-one representatives of the International Steelworkers Union, and three representatives of the Independent Guard Union. Funds for the various activities of this Committee were raised from the unions involved, community donations, grants from the State of West Virginia, and other sources.

In April, 1982, after a competitive selection process, the Joint Study Committee hired the consulting firm of McKinsey & Co. to conduct a feasiblity study on the economic viability of an independent, employee-owned Weirton Steel company. In July, 1982, McKinsey & Co. released a report concluding that such a venture could be successful, but only if labor and production costs were reduced and if substantial capital improvements could be effected over a period of ten years.

The employee buy-out option preferred by the Joint Study Committee and the one pursued includes an Employee Stock Ownership Plan (ESOP), which will allow the new employee-owned corporation to borrow funds to finance the sale to earn shares of stock as initial loans are paid. An ESOP presents an opportunity for significant tax savings for the proposed company under the Internal Revenue Code.

As the employee buy-out plan progressed, the Joint Study Committee hired other consultants to assist in formulating various complex aspects of the procedure. These include the law firm of Ludwig & Curtis, of San Francisco, to advise on the structure of an ESOP; the law firm of Wilkie, Farr & Gallagher, of New York, to represent the Committee and the proposed new corporation in negotiations with National Steel regarding acquisition of the Weirton Division assets; the investment banking firm of Lazard, Freres & Co., of New York, to assist with all questions of finance; the accounting firm of Towers, Perrin,

Foster & Crosby, of Pittsburgh, to conduct an audit of National's pension plans for Weirton Division employees. All of these consulting firms, and others involved in the study, enjoy national or international reputations for expertise in the fields for which they were hired.

During the summer of 1982, the Independent Steelworkers Union conducted elections which resulted in a new Union leadership team, and by virtue thereof, new Union representation on the Joint Study Committee. The former president of the Union, Richard Arango, filed unfair labor practice charges against National Steel and the Independent Steelworkers Union with the National Labor Relations Board on April 5, 1983. The charges allege representatives of the employer (National Steel) have participated on a negotiating committee which purports to represent bargaining unit employees in collective bargaining negotiations with the employer. The Court presumes the "negotiating committee" means the Joint Study Committee, on which Arango formerly served as co-chairman by virtue of his Union presidency. One of the *Sutton* plaintiffs, William Willoughby, served on the committee's board of directors until he was voted out of his Union office of Vice-Chairman, Tin Mill Division.

On March 11, 1983, National Steel and Wilkie, Farr & Gallagher (the law firm hired to negotiate a sale of Weirton Division assets for the Joint Study Committee) announced an agreement in principle for the terms of sale from National to Weirton Steel Corporation (the proposed employee-owned company). The agreement has been amended by an addendum announced April 8, 1983. During 1983, Wilkie, Farr & Gallagher formed a "shell" corporation in the State of Delaware in anticipation of the success of the employee buy-out venture.

In order to carry out the provisions of the agreement in principle, as amended, and to implement the employee buy-out, members of the Independent Steelworkers Union and the In-

dependent Guard Union must conduct an election to modify existing collective bargaining agreements with National Steel. Both the mechanisms of the employee buy-out and the implications of such a venture are extremely complex. In order to inform union memberships of the various aspects of the proposal, the Joint Study Committee and its consultants have taken steps to produce a "disclosure document" which they hope will reveal all of the facts necessary to an understanding of the venture and its ramifications for the employees of the new Weirton Steel company.

Should the employee buy-out be implemented, Weirton Steel Corporation will succeed National Steel's Weirton Division as the largest private-sector employer in West Virginia. It will also be one of the largest corporations in the United States and *the* largest employee-owned corporation in the country. As all the parties are aware, the venture (like any large corporate undertaking) is not without risk. Consultants for the Joint Study Committee believe success is possible, given certain economic and social circumstances. However, it must be realized that such expressions are only educated forecasts. Long term success depends upon the general economic trends, as well as trends specifically involving markets for the products produced at the Weirton facility.

For members of the Independent Steelworkers Union and the Independent Guard Union, two personal choices must be made before an employee-owned company can become a reality. First, as mentioned earlier, a majority of the Union members must decide to vote in favor of amendments to the existing collective bargaining agreement which will reflect the terms of sale from National to the new Weirton Steel company. Second, each member must make a personal decision on whether to become an employee of the new company. For some workers, the second decision will be made more difficult because of the opportunity for immediate retirement from National with totally predictable pension and other benefits for the future. The

terms of sale, as amended, include provisions that employees meeting the chronological age and years of service requirements, for some of the types of retirement in the applicable pension plan, may elect to retire five days after the union votes referred to above. Such decision to retire will be effective as of April 30, 1983, a date before the transfer of ownership, but a date set for accounting purposes.

All workers, whether they choose to work for the new company or not, will retain the pension benefits earned through service with National Steel prior to the transfer of ownership. Naturally, pension rights earned and accrued after the transfer of ownership (with the exception of certain "safety net" features to be discussed below) will be the responsibility of the new employee-owned company. Plaintiffs express the concern that pension rights earned after transfer to the new company will not be as secure as those earned under National Steel, which has a proven record of corporate stability.

Of course, the union members may decide not to go forward with the proposed employee buy-out and in such event the underlying issues will be moot. While the alternative appears to be massive unemployment in the tri-state community, the workers may feel that the risks of a new steel production venture in an uncertain market are too high. In short, the ultimate decision on whether to go forward with the employee buy-out rests with the members of the unions through their approval or disapproval of the terms of sale and other aspects of the new venture.

STATEMENT OF THE ISSUES

This litigation focuses on the propriety of terms of sale regarding pension and severance pay benefits for members of the Independent Steelworkers Union. Amendments to existing pension and collective bargaining agreements must be approved before a transfer of the Weirton Division from National Steel to an employee-owned entity can be effected.

Defendant National Steel filed a proposed statement of the issues and requested expeditious consideration of them. This was followed by the instant motion for summary judgment. Counsel for Plaintiffs in the *Sutton* case have also filed a statement of the issues. The Court believes the issues presented by National's motion are fair statements of the major claims of the complaint in *Brunner* and many of the claims in *Sutton*, and those claims that should be decided before union members are asked to vote on the proposed employee buy-out. Not all of the issues raised in *Sutton* and *Brunner* are included in the request for summary judgment, and, therefore, the Court views National's motion as a motion for partial summary judgment. The remaining, less pressing issues presented by the complaints can be resolved through later proceedings.

As will be more carefully detailed below, the terms of sale between National Steel and an employee-owned company specify that the transfer of ownership, without more, will neither trigger entitlements to 70/80 retirements or Rule of 65 retirements under the applicable pension plan nor establish severance allowance payments under the applicable collective bargaining agreement. The terms also limit eligibility to 70/80 and Rule of 65 retirement after the transfer. The complaints in *Brunner* and *Sutton* charge, inter alia, that the failure of the transfer to trigger rights to these employee benefits violates various provisions of the Employee Retirment Income Security Act (ERISA), various other provisions of labor law, and the terms of the applicable pension and collective bargaining agreements. In general, the motion for summary judgment presents the legal issue of whether the terms of sale, which are proposed to amend existing pension and collective bargaining agreements, deprive any Plaintiff of a right or benefit guaranteed by law.

From an examination of the pleadings, the motion for summary judgment, and other matters of record, the Court defines the following two specific issues for resolution by this partial summary judgment proceeding:

1. Whether the terms of sale proposed to amend the Rule of 70/80 and Rule of 65 retirment provisions of the pension agreement between National Steel Corporation and the Independent Steelworkers Union violates:

a. provisions of ERISA relating to prohibited transactions;

b. provisions of ERISA relating to fiduciary duties imposed upon National Steel or the pension plan;

c. provisions of ERISA relating to vested accrued benefits or non-forfeitable benefits;

d. provisions of the pension or collective bargaining agreements, or

e. other provisions of labor law as specified in the complaints.

2. Whether the terms of sale proposed to amend severance allowance provisions of the collective bargaining agreement between National Steel Corporation and the Independent Steelworkers Union violates:

a. provisions of ERISA relating to prohibited transactions;

b. provisions of ERISA relating to fiduciary duties imposed upon National Steel;

c. provisions of ERISA relating to vested accrued benefits or non-forfeitable benefits;

d. provisions of the collective bargaining agreement, or

e. other provisions of labor law as specified in the complaints.

At various points in the *Brunner* and *Sutton* complaints it is alleged that National Steel and the Independent Steelworkers Union acted in concert. Although the instant motion has been propounded only by Defendant National Steel, the Court must necessarily examine actions by the Union to reach the issues presented.

It is important at this point to specify matters the Court does not consider in its decision on the motion for partial summary judgment. Several claims by the Plaintiffs have earlier been resolved on motion to dismiss, and need not be further considered here. These include the claim that the Joint Study Committee exceeded its corporate charter, as was alleged in the *Brunner* complaint, and the claims that the actions of Defendants violated the West Virginia Labor Management Relations Act and other policies of the Government of West Virginia, as alleged in the *Sutton* complaint.

In addition, as has previously been mentioned, Richard Arango, who is not a party to this litigation, but who is represented by counsel who is also representing the *Brunner* Plaintiffs, has filed unfair labor practices charges before the National Labor Relations Board (NLRB). Several allegations charging violations of federal law in the *Brunner* complaint at §§ 21, 36, and 43, and in the *Sutton* complaint at §§ 210, etc., involve the same factual and legal questions as have been presented to the NLRB in the above-referenced unfair labor practices charges. The Court is of the opinion that those claims which directly relate to the legality of the Independent Steelworkers Union and the Independent Guard Union joining forces with Weirton Division management, through the Joint Study Committee, to negotiate terms of the sale of the Weirton Steel Division to a proposed employee-owned corporation should await a decision by the NLRB, the administrative body having special competence in this area.

Finally, the Court would note that this litigation has focussed on the effects of the proposed sale on the Independent Steelworkers Union and its members to the exclusion of members of other unions and non-union, salaried employees at the Weirton Division of National. The answer of Defendant Union in *Sutton* denies that all Plaintiffs in that civil action are actually members of the Union. That is a factual issue that must be left for later resolution. This Opinion and Order will only af-

fect those Plaintiffs who are members of the Independent Steelworkers Union who are production, maintenance, and hourly-rated clerical employees. The litigation has also focused on the legality of the terms of sale which, if approved, will modify terms of existing pension and collective bargaining agreements to the exclusion of such terms of employment, compensation, etc., for workers of the new employee-owned company that may be negotiated by the Union and management representatives of the proposed company.

ISSUES AFFECTING BOTH PENSION AND SEVERANCE CLAIMS

The specific issues presented by the instant motion must be decided in the context of an employer desiring to close a substantial portion of a major steelmaking plant and the employees taking steps to pursue an employee buy-out, with the support and aid of the community. There are some underlying principles of law which will control the Court's decision on both the pension and severance allowance questions.

At the outset, the Court would note that unions are, and should be, permitted to pursue unique procedures and mechanisms to avoid loss of employment for union members when faced with crisis-type situations, such as an impending plant closure. *See United Steelworkers of America v. United States Steel Corp.*, 492 F. Supp. 1, 9-10 (N.D. Ohio), *aff'd in part, rev'd in part*, 631 F.2d 1264 (6th Cir. 1980). It has been held that unions and employers in such circumstances may tak steps not contemplated in existing documents controlling nor mal labor relations. *See Ekas v. Carling Nat. Breweries*, 60 F.2d 664, 666-667 (4th Cir. 1979), *cert. denied*, 444 U.S. 101 (1980). Indeed, the parties here are exploring relatively uncharted waters. The employee buy-out, if approved and implemented, apparently will result in the largest employee-owned company in the nation.

All parties agree that the March 2, 1982, announcement by National Steel that it would no longer invest in its Weirton Division was not a ploy to coerce workers into giving labor cost concessions. It was an economic decision by the corporation to place its investment capital in other areas. It is further uncontroverted that National expressed willingness to explore an employee buy-out or other option. (Bish Affidavit, *Brunner* case, Paper 5, § 8); (Willoughby Affidavit, *Sutton* case, Paper 21, § 12); The Independent News, March 16, 1982, at 1 (Plaintiffs' exhibit 10, hearing of April 27, 1983); Letter of Richard Arango (Plaintiffs' Exhibit 9, hearing of April 27, 1983). In general, it would appear the employer and the employees took appropriate positions and pursued appropriate activities in the circumstances. Though not concerned with National's economic decision to phase-out Weirton Division, employer and employees began to explore avenues to ameliorate the effects of the decision. *See generally, First National Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666 (1981).

As earlier stated, the terms of sale at issue here must be approved by a union vote as amendments to existing agreements with the employer before they can be implemented. There have been claims by Plaintiffs that it is unlawful to modify in any way the employee rights created under an existing agreement. (See, e.g., *Sutton* complaint at §§ 214, 219, 221; *Brunner* complaint, at § 48). The collective bargaining agreement (at Article XXI) contains provisions allowing amendments and modifications. In addition, it is clearly permissible for union leadership to recommend to the membership a modification to an existing agreement, *See Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), even where the contract does not provide for amendments. *See Battle v. Clark Equipment Co.*, 579 F.2d 1338, 1347 (7th Cir. 1978). Modifications to existing contracts are frequently negotiated when the union is faced with a plant closing or phase-out. *Id.* and *Ekas v. Carling Nat. Breweries, supra*, 602 F.2d at 666-667).

Further, it is not per se unlawful to modify prospective pension or severance pay benefits, provided that no ERISA or other labor law is violated by the change. *See Fentron Industries v. Nat. Shopmen Pension Fund,* 674 F.2d 1300, 1306 (9th Cir. 1982). Nor is it impermissible to negotiate for changes in such benefits when an employer announces a plant closing or partial closing. *N.L.R.B. v. North Carolina Coastal Motor Lines, Inc.,* 542 F.2d 637, 638 (4th Cir. 1976).

It is the view of the Court that the issues of labor organization law raised by these complaints boil down to whether the Independent Steelworkers Union leadership's acceptance of the terms of sale, involving severance allowances and pension benefits, as negotiated by the Joint Study Committee consultants, and the expected Union recommendation to its membership that it vote in favor of the terms of sale, is a breach of the Union's duty of fair representation. (See *Brunner* complaint at §§ 35-36, 45-48; *Sutton* complaint at §§ 200, 209-210, 212.)

It is well established that labor unions have a statutory duty to fairly represent all employees in the bargaining unit in collective bargaining and enforcement of bargaining agreements. The duty includes an obligation to serve all members without discrimination and to exercise union discretion with good faith and honesty, and to avoid arbitrary conduct. *Vaca v. Sipes,* 386 U.S. 171, 177 (1967). The breach of such duty occurs only when a union's conduct is arbitrary, discriminatory, or in bad faith. *Id.* at 190.

On the basis of reasoning set forth below, the Court concludes that the proposed amendments to the pension agreement and to severance pay allowance provisions in the collective bargaining agreement violate neither ERISA nor the terms of existing agreements. Therefore, it cannot be said that the Union will act in bad faith in recommending the terms of sale, with the amendments to said agreements, to its membership. Because the amendments apply to all Union members equally (indeed,

most amendments apparently will affect all employees at National's Weirton Division, whether Independent Steelworkers members or not), it cannot be said that the Union acted with discrimination toward any sub-group of the membership. *See Generally, Ekas v. Carling Nat. Breweries, Inc., supra,* 602 F.2d 664.

There is no doubt that the Joint Study Committee is union-dominated. (See Articles of Incorporation, Exhibit to Affidavit of Walter Bish, Brunner case, Paper 5.) The evidence adduced at the two hearings on preliminary injunctive relief earlier conducted has impressed the Court with the quality and scope of consulting firms employed by the Joint Study Committee. It appears that each major step in the complex process of arranging for the proposed employee buy-out—feasibility, financing, auditing existing labor costs, corporate structure, terms of sale, etc.,—has been entrusted to firms with national or international reputations. Testimony adduced indicates that the Committee extensively relied on the work of the experts hired. Plaintiffs have made no specific allegation that the decision to recommend the severance allowance and pension benefit amendments was arbitrary, and, under the circumstances, it would appear that such an allegation would be insubstantial.

In conclusion, the Court is satisfied that the Union violated no duty of fair representation with regard to severance allowance and pension benefit amendments in the *Sutton* and *Brunner* cases.

In addition, union fiduciary duties in regard to employee welfare plan participants and beneficiaries arising under ERISA or other federal labor law are not necessarily implicated when union leadership participates in negotiations for amendments to existing agreements and recommends the products of such negotiations to union membership. *See NLRB v. Amax Coal Co.,* 453 U.S. 322 (1981), *Carr v. Learner,* 547 F.2d 135 (1st Cir. 1976). *See generally, UMWA Health & Retirement Funds*

v. Robinson, 455 U.S. 562 (1982). This Court is of the view that this principle applies in the instant, unique situation when agents negotiate with the employer on behalf of a union-dominated committee.

PENSION BENEFIT ISSUES

Under the existing pension agreement between National Steel and the Independent Steelworkers Union, there are eight distinct types of retirement, or methods of determining eligiblility for a pension.[1] For normal retirement; 62/15 retirement; 30-year retirement, and 60/15 retirement, the plan participant becomes eligible simply through achievement of certain chronological age and years of service factors. Participants with 15 years of service who become permanently incapacitated, as defined in the plan, are eligible for permanent incapacity retirement. Persons with 10 years of service whose continuous service is broken for any reason are eligible to receive a deferred vested pension after reaching age 62 or 65, depending on the participant's age at the time service was broken. The remaining types of retirement, rule of 65 retirement and 70/70 retirement, are the subject of the pension issues in this litigation. While age and years of service are aspects included in determining eligibility, other factors are as follows:

---

[1] National Steel Corporation maintains a pension plan (referred to in the record as Plan 001) for all types of employees (union and non-union) at various corporate facility locations including the Weirton Division. A copy of the plan has been made part of the record in each case before the Court as Exhibit A, Affidavit of John A. McCreary. The Independent Steelworkers Union has negotiated a pension agreement for their members which provides substantially the same benefits as Plan 001. A copy of this agreement has been made a part of the record in each case as Plaintiffs' Exhibit 4, hearing of April 27, 1983. Unless the corporate plan is specifically mentioned, the Court relies upon the language of the Union pension agreement for all purposes having to do with this motion for summary judgment. Thus, whether the Court refers to pension plan or pension agreement, reference is made to the Union pension agreement.

70/80 Retirement

2.6 Any participant who has not attained the age of 62 years and who shall have had at least 15 years continuous service and (i) shall have attained the age of 55 years and whose combined age and years of continuous service shall equal 70 or more, or (ii) whose combined age and years of continuous service shall equal 70 or more, or (ii) whose combined age and years of continuous service shall equal 80 or more, and

(a) whose continuous service is broken by reason of a permanent shutdown of a plant, department or subdivision thereof or by reason of a layoff or physically disability, or

(b) whose continuous service is not broken and who is absent from work by reason of:

(1) a layoff resulting from his election to be placed on layoff status pursuant to the provisions of the Basic Agreement applicable in the event of a permanent shutdown, or

(2) a physical disability or a layoff other than a layoff resulting from an election referred to above and whose return to active employment is declared unlikely by the Company, or

(c) whose continuous service is not broken and who, while on layoff status by reason of his election to be placed on such status pursuant to the provisions of the Basic Agreement applicable in the event of a permanent shutdown, accepts a job with the Company and, prior to the expiration of 90 consecutive calendar days from the first day worked on such job, elects to retire, or

(d) who considers that it would be in his interest to retire, and the Company considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions,

shall be eligible to retire on or after July 31, 1980 and shall upon his retirement (hereinafter "70/80 retirement") be eligible for a pension

Rule-of-65 Retirement

2.7 Any participant (i) who shall have had at least 20 years of continuous service as of his last day worked, (ii) who had not attained the age of 55 years, and (iii) whose combined age and years of continuous service shall equal 65 or more but less than 80, and

(a) whose continuous service is broken by reason of a layoff or disability, or

(b) whose continuous service is not broken and who is absent from work by reason of a layoff resulting from his election to be placed on layoff status pursuant to the provisions of the Basic Agreement applicable in the event of a permanent shutdown, or

(c) whose continuous service is not broken and who is absent from work by reason of a physical disability or a layoff other than a layoff resulting from an election referred to above and whose return to active employment is declared unlikely by the Company, or

(d) who considers that it would be in his interest to retire, and the Company considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions,

and who has not been offered suitable long-term employment as defined in Appendix A, shall be eligible to retire on or after July 31, 1980, and shall upon his retirement (hereinafter "rule-of-65 retirement") be eligible for a pension; provided, however, that if at the time of application for retirement the Company has not yet determined whether the participant will be offered suitable long-term employment, the participant will not be eligible to retire until the earlier of the date on which the Company advises the participant that he will not be offered suitable long-term employment or the date on which the participant incurs a break in continuous service.

In addition, among the provisions in the plan for calculating the amount of pension under the various types of retirement, increased pensions are described for 70/80 and rule of 65. With certain exceptions, the monthly amount determined under the regular rules is now increased by $400.00 for beneficiaries of 70/80 and rule of 65 retirement.

The terms of sale from National to the employee-owned company will require a number of changes in the existing pension agreement. However, no change will be effected that will decrease any accrued benefit as determined under the existing plan, and National Steel shall remain liable for all accrued benefits "earned" prior to the closing date. Under the terms of sale, National will segregate the liabilities and assets of the existing fund attributable to Weirton Division employees (the existing fund covers employees at other National Steel divisions in addition to Weirton) and establish a separate trust fund and insurance contract which will only be available to pay benefits to Weirton Division employees, including those already retired, those transferring to the new company, and those on layoff status.

Those employees of National Steel who remain working under the new employee-owned company will, in effect, look to both National and the new company for pension benefits upon

retirement. The terms of sale provide a method of calculating benefits payable by each company, which is based on an individual's years of service with each employer.

Especially pertinent to this litigation are the terms which modify the eligibility for 70/80 retirement and rule of 65 retirement and the increased pension benefits for these types of retirement. For transferred employees only (those who were employees of National and who choose to become employees of the new company), conditions giving rise to eligibility for 70/80 and rule of 65 retirement will be limited to a permanent shutdown, as defined in existing pension and collective bargaining agreements, which occurs within five years of the transfer of ownership date for accounting purposes (May 1, 1983). The increased pension ($400 per month) will only be payable if a permanent shutdown occurs. The terms of sale also require that the pension and collective bargaining agreements be modified to reflect the fact that the sale and transfer of ownership does not constitute a shutdown for purposes of pension or retirement benefits or severance allowance. (Thus, the sale and transfer of ownership, without more, will not trigger eligibility to any of these benefit programs.)

The Court earlier stated that it is not per se unlawful to alter a pension plan with respect to prospective benefits, provided the change doesn't violate other ERISA requirements. The Court must now decide whether the amendments proposed to 70/80 retirement and rule of 65 retirement violate the Act's minimum requirements for vesting, accrued benefits, or nonforfeitability.

In general terms, the labor law provisions of ERISA provide a system of safeguards designed to strengthen private employee pension and welfare benefit plans. (The provisions of ERISA made part of the Internal Revenue Code are generally not at issue here.) ERISA does not require an employer to offer any type of benefit, but, if it does so, the plan must comply with the minimum requirements of the Act.

With regard to pensions, ERISA imposes no obligation on a plan to pay benefits before an employee reaches normal retirement age. Any right to earlier benefits must be found in the individual agreement. *Fine v. Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983) (citing *Pompano v. Michael Schiayone & Sons*, 680 F.2d 911 (2nd Cir.), *cert. denied*, ____U.S.____, 74 L.Ed.2d 607 (1982). Under ERISA, normal retirement age means the earlier of normal retirement age under the plan or the later of the time the participant attains age 65 or reaches the 10th anniversary of participation in the plan. 29 U.S.C. § 1002(24). The plan in issue defines normal retirement age as 65.

An accrued benefit is the interest in the plan to which a participant has become entitled. Am.Jr.2d *Pension Reform Act* § 73 (1975). In the case of a defined plan, such as at issue here, it means an individual's rights to a retirement benefit determined under the plan, expressed in the form of an annual benefit starting at *normal retirement age*. 29 U.S.C. §1002(23)(A) (emphasis supplied). A non-forfeitable pension benefit or right is a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, *which is unconditional*, and which is legally enforceable against the plan. 29 U.S.C. § 1002(19) (emphasis supplied). In sum, ERISA is designed to protect plan benefits for normal age retirement which are unconditional.

Accrued benefits under ERISA do not include such things as conditional benefits, premiums for medical and life insurance payable as a lump sum, or the value of the right to receive early retirement benefits. *See* H.R. Report No. 93-807, 93rd Cong., 2d Sess. ____, *reprinted in* 1974 U.S. Code, Cong. & Ad. News 4670, 4726. Am. Jur. 2d *Pension Reform Act* § 73 (1975). *See generally, Petrella v. NL Industries*, 529 F. Supp. 1357, 1365-1366 (D.N.J. 1982). These are ancillary benefits which may be amended or deleted without violating ERISA. *Id.*

An examination of the eligibility requirements for 70/80 and rule of 65 retirement reveals they are conditional and in the nature of early retirement benefits and cannot be considered non-forfeitable or as an accrued benefit. *Capocci v. General Motors Corp.*, 444 F. Supp. 1306, 1307-1308 (D. Hawaii 1978). Since the increased $400.00 per month pension payment is conditioned upon eligibility for 70/80 or rule of 65 retirement, it cannot be considered non-forfeitable. The Court has considered the potential applicability of 29 U.S.C. § 1056(a) and finds that it does not require a contrary mandate on the issues raised here.

Under ERISA, "vesting" is a term that is tied to the term "accrued benefit." To prevent any possible misunderstanding of the Court's language in the previous paragraph, the proposed terms of sale with regard to 70/80 and rule of 65 retirement and the increased pension payments thereunder do not violate any minimum vesting standards under ERISA. This is because the terms of sale affecting pensions do not disturb the normal retirement benefit or the deferred vested pension benefit, *See* 29 U.S.C. § 1053, and since the terms of sale provide that all accrued benefits shall become vested upon transfer of ownership. *See* 26 U.S.C. §411(d)(3).

In short, Congress did not intend to impose upon a plan requirement that any benefits be payable before reaching age 65 or the normal retirement age (65 in this case) under the plan. *Riley v. MEBA Pension Trust*, 452 F.Supp. 117, 120 (S.D.N.Y.) *aff'd*, 586 F.2d 968 (2nd Cir. 1978).

Plaintiffs in the *Sutton* litigation also allege Defendants have failed to provide sufficient information about the proposed amendments and thus allege a violation of ERISA. The Court is unable to find any provision of the Act that would mandate an employer to supply information regarding amendments before the amendments are effected. 29 U.S.C. §§ 1022, 1024(b). *See* 29 C.F.R. §§ 2520.104b-3 and -4. Further, it appears uncontroverted that each member of the Independent Steelworkers

Union was supplied with a copy of the agreement in principle setting forth the terms of sale (including those proposed to amend pension agreements) prior to the filing of the *Sutton* action.

Plaintiffs also claim amendments to the pension plan violate the basic terms of the agreement itself. The corporate plan document includes additional administrative provisions beyond those included in the Union pension agreement. Those provisions include, in Section VIII, National's power to amend or modify the program within certain bounds not applicable here. (The Court presumes the section on amendments is part of the pension agreement applicable to Union members. In any case, all pension plans subject to ERISA must include a provision for plan amendment. 29 U.S.C. § 1102(b).) The current collective bargaining agreement also provides for amendments in Article XXI.

Plaintiffs allegation that the amendments violate the plan itself would seem to assume that all provisions in the agreement are "written in stone," and never subject to change. Such is not sound law. *See generally, UMWA Health & Retirement Funds v. Robinson,* 455 U.S. 562 (1982). As the Court understands, a proposed amendment would only violate the language of the agreement when a particular individual's unconditioned rights are affected (or the amendment is unreasonable). *Rochester Corp. v. Rochester,* 450 F.2d 118 (4th Cir. 1971). In other contexts, but in cases arising under ERISA, the Supreme Court has said, "it is the claim to the benefit rather than the benefit itself that must be 'unconditional' and 'legally enforceable against the plan.' " *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 512 (1981). *Nachman Corp. v. P.B.G.C.,* 446 U.S. 359, 371 (1980). Since the Court has earlier found that any rights a particular Plaintiff might have under 70/80 and rule of 65 retirement are contingent and conditional, it must also find that a proposed amendment to the provisions for these types of retirement do not violate the terms of the agreement itself.

Further, the proposed changes must be seen as reasonable. They are proposed in the context of an anticipated change in ownership where the majority of active workers will immediately become employees of the new owner. Since a "shutdown" of National's Weirton Division is not anticipated, in any sense, it is reasonable to propose amendments which would clarify existing language regarding shutdown and suitable long-term employment. The present eligibility for 70/80 and rule of 65 retirement conditions also include such things as layoff, disability, and other matters involving the discretion of the employer. Since the amendments proposed only affect a situation that would arise after a transfer of ownership, the Court must find that eliminating such conditions are reasonable since they are properly the concern of the relationship between the new employer and the employee. (Indeed, it is uncontroverted that it is presently the plan of the Union to demand substantially the same pension benefits as presently exist from the new employer.)

Plaintiffs have not directed the Court's attention to any provision of the collective bargaining agreement which would preclude any amendments, or the specificly proposed amendments, to the pension agreement. The Court perceives no aspect of the collective bargaining agreement which would bar pension agreement modifications. Therefore, the terms of sale that propose to amend the pension agreement do not violate the terms of the collective bargaining agreement between National Steel and the Independent Steelworkers Union.

The terms of sale negotiated on behalf of the Joint Study Committee include what has been labelled by counsel as a "safety net" feature. In effect, National will continue to offer its former employees 70/80 and rule of 65 retirements if, and only if, the new company should suffer a shutdown of substantially all of its facilities within five years of the closing or transfer date. National Steel was not required to extend this "safety net" feature of its former employees under ERISA. This is

merely a term of sale negotiators acting for the Joint Study Committee were able to extract from National Steel on behalf of those employees who will transfer employment to the new company.

Plaintiffs contend that the terms of sale, if carried out, will result in a prohibited transaction and a violation of fiduciary duties under ERISA. (*Brunner* Complaint §§ 14, 16, 17, 30; *Sutton* Complaint §§ 186, 211.)

These allegations appear to have several bases. First, one of the Plaintiffs in *Sutton* asserts that the sole motivation of National Steel in desiring to divest or "downsize" the Weirton Division is to avoid unfunded pension "obligations" to employees. (Affidavit of Willoughby, *Sutton* case, Paper 21.) This allegation is also made in the *Brunner* complaint at § 17. This assertion is contrary to other evidence offered by Plaintiff in several respects. (*See*, e. g., Letter of Richard Arango, Plaintiffs' Exhibit 9, hearing of April 27, 1983; The Independent News, March 16, 1982, at 1, Plaintiffs' Exhibit 10, hearing of April 27, 1983; Proposals for Acquisition from National Steel, etc., at Section III, Exhibit to amended complaint in *Sutton*, Paper 11; National Steel Corporation Affidavit of Willoughby dated June 28, 1983.)

Second, Plaintiffs assert that "vested inchoate pension benefits" are being "sold" or constitute part of the sale proposed between National Steel and a new company. (See, e.g., *Sutton* case, Paper 22 at § 3.) This assertion is directly contrary to other evidence offered by Plaintiffs. The terms of sale proposed in the agreement in principle announced March 11, 1983, clearly indicate that all assets and liabilities of National Steel's pension that affect any former or present Weirton Division employee will be segregated and transferred to a separate trust, fund, and/or insurance contract, which will be available only to pay benefits to Weirton Division employees. No "vested inchoate pension benefits" will be sold by National to anyone. The Court recognizes that pension issues are a factor considered by

all parties to the proposed sale (*See* pension calculations audit by Towers, Perrin, Forster & Crosby at 1, Plaintiffs' Exhibit 23, hearing of April 27, 1983.), but no pension "obligations" are being transferred from National Steel to the new employee-owned company.

Grant of summary judgment is precluded where there is genuine dispute as to material facts in issue, even where the assertions of the opposing party are fantastic or highly improbable. *Arnestein v. Porter*, 154 F.2d 464 (2nd Cir. 1946). Here, it is the opinion of the Court that the two sets of allegations set forth above do not preclude summary judgment. The assertions with regard to National Steel's motivations for divestiture are not disputed since there is only a conflict in the evidence offered by Plaintiffs. No Defendant has offered a factual basis for National's motivation. The assertions with regard to a sale of "vested inchoate pension benefits" is in conflict with credible and uncontroverted facts and must be viewed as a mistake or a frivolous assertion designed merely to avoid summary judgment. *See* Fed. Proc., L.Ed. § 62:550 (1981). A rational interpretation of the evidence presented by Plaintiffs concerning National's motivation would be that avoiding future pension obligations to employees of the Weirton Division was *one* of the factors motivating National Steel to consider "downsizing" or divesting the Division. In deciding the prohibited transaction and fiduciary duty questions, however, the Court will assume that avoiding future pension obligations was the sole motivation of National, as alleged by Plaintiffs. The Court does not find that any vested pension rights or benefits are being sold.

A third basis for the allegations of prohibited transaction or fiduciary duty violations appears to be the earlier mentioned fear of some Plaintiffs that some pension rights "earned" after transfer to the new company will not be as secure as those "earned" under National Steel. (Affidavit of Willoughby, *Sutton* case, paper 21, at §§ 7-9.) (Certain pension benefits earned or accrued as an employee of the new company will be insured

by Pension Benefit Guaranty Corporation, although the Court recognizes that some ancillary benefits are not insured.)

A fourth basis for the allegations appear to be the assertion that National Steel has not acted solely in the interests of pension plan beneficiaries and participants. (*See, e.g.*, *Brunner* complaint at § 45; Sutton complaint at § 186.)

Plan fiduciaries must discharge duties with respect to an employee benefit plan solely in the interests of plan participants and beneficiaries. 29 U.S.C. § 1104. The fiduciary must act for the exclusive purpose of providing benefits to beneficiaries and must conduct the affairs of the plan with the care, skill, prudence, and diligence under the circumstances that a prudent man would use. Further the fiduciary must diversify the plan investments so as to minimize the risk of large losses, and must act in accordance with the documents and instruments governing the plan insofar as they are consistent with law. *Id.* In addition to the general fiduciary standards set forth in § 1104, certain specific rules relating to defined prohibited transactions are contained in 29 U.S.C. § 1106. A fiduciary is not permitted to have the plan engage in certain direct or indirect transactions with a party in interest. A plan fiduciary is also not permitted to deal with plan assets in his own interest, on behalf of persons whose interests are adverse to the interests of the plan, or receive any personal consideration as a result of plan transactions. *Id.*

According to the terms of the pension agreement, it is clear that National Steel, as plan administrator, is a fiduciary and must carry out duties with regard to plan management in accordance with the fiduciary standards set forth above. An examination of the more extensive corporate plan document together with the Union pension agreement reveals that certain designated National employees administer the plan with respect to payment of benefits, etc., but that the plan is financed through contributions to a trust fund managed and held by a separate entity.

It is the opinion of the Court that the duties with regard to prohibited transactions apply directly to activities affecting the fiscal assets of the plan funds. In other words, for the provisions of 29 U.S.C. § 1106 to apply, there must be a transaction involving the monies, property, or other assets of the fund. *See Donovan v. Bierwirth,* 680 F.2d 263, 270 (2nd Cir. 1982), *cert. denied,* ____U.S.____, 103 S.Ct. 488 (1983). This notion flows from the very language of the statute itself ("A fiduciary ... shall not cause the plan to engage in a transaction..., etc.) and is supported by the legislative history. *See* H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess., ____, *reprinted in* 1974 U.S. Code, Cong. & Ad. News, 5038, 5087-5089.

The segregation of National Steel pension fund assets relating to Weirton Division employees for transfer to a separate trust account, as contemplated in the terms of sale, is not the type of transaction, in the Court's judgment, which would invoke 29 U.S.C. § 1106. The Court earlier concluded that the assets of a pension fund were not being sold in any manner and neither the assets nor the liabilities of the National Steel pension fund were being transferred to the new company. The Court now finds that the terms of sale under consideration do not require a pension fund to conduct any transaction, prohibited or not prohibited, such as would implicate 29 U.S.C. § 1106.

It would appear that Congressional intent with regard to the more general fiduciary duties of 29 U.S.C. § 1104 also focussed on activities affecting the fiscal assets of the plan. *See* H.R. Rep. No. 93-533, 93rd Cong., 2d Sess., ____, *reprinted in* 1974 U.S. Code Cong. & Ad. News, 4639, 4659; S. Rep. No. 93-127, 93rd Cong., 2d Sess., ____, ____, *reprinted in* 1974 U.S. Code Cong. & Ad. News, 4838, 4847 and 4864-4865. However, some federal courts have expanded the expression of fiduciary duty beyond transactions involving pension fund assets. Without making a decision which would have precedential value in this jurisdiction, it is the opinion of the Court that this hearing on motion for summary judgment requires acceptance of a liberal

view of fiduciary duties under § 1104 thus giving Plaintiffs' opposition to the motion the broadest possible consideration. The dichotomy between Congressional intent and judicial treatment aside, it is firmly established that the standard for review of fiduciary action when a § 1104 violation is alleged is whether the action is arbitrary and capricious. *See, e.g., Fentron Industries v. Nat. Shopmen Pension Fund,* 674 F.2d 1300, 1307 (9th Cir. 1982). Therefore, a violation of § 1104 fiduciary standards must be based on a showing of bad faith or some other indicia of arbitrary and capricious action. *Id.* and *Schulist v. Blue Cross of Iowa,* 553 F. Supp. 248 (N.D. Ill. 1982).

The Court's earlier finding that the proposed amendments to the pension agreement, inherent n the terms of sale, do not violate ERISA's vesting and non-forfeitability provisions precludes any contention that a fiduciary duty was breached on the basis that some pension "obligation" will be limited or forfeited if the terms of sale are approved. *Petrella v. NL Industries, supra,* 529 F. Supp. at 1366-1367. *Cf. Brug v. Pension of Carpenters, etc.,* 669 F.2d 570, 574-576 (9th Cir.), *cert. denied,* ____U.S.____, 74 L.Ed.2d 116 (1982) (amending pension eligibility retroactively violates fiduciary duty on facts presented).

Beyond this, the remaining contentions are that a fiduciary duty may have been violated because avoiding prospective pension obligations motivated National Steel; that pension rights "earned" under employment with the new company may not be as secure as those "earned" under National Steel, and that National Steel has not acted solely in the interests of pension plan beneficiaries and participants.

The Court believes that ERISA cannot be perceived as requiring federal courts to weigh the potential success of one company as opposed to another when divestiture of a plant through sale to another entity is proposed. Plaintiffs' search for security of pension benefits to be earned in the future is something that is not contemplated by ERISA (beyond insuring certain minimal

benefits protected by the Pension Benefit Guaranty Corporation).

Plaintiffs' contentions that fiduciary duties are violated because National was motivated to avoid prospective pension benefits, and that National has not acted solely in the interests of pension plan beneficiaries and participants suffer two fatal defects. First, embracing Plaintiffs' theory *in toto* would preclude *any* company offering pension benefits from amending the plan in such a way as to limit or eliminate provisions for benefits that are not vested or accrued. As stated before, such is not the state of the law.

Second, Plaintiffs' theory requires a view that *every* corporate decision arguably affecting pension benefits must be made solely in the interests of pension plan beneficiaries and participants. In the context of a decision which limits or eliminates prospective, conditional pension benefits, not required by the vesting and non-forfeitability provisions of ERISA, such is not the case.

The pension agreement specifies that National Steel is the plan administrator and trustee of the pension plan. A "dual loyalty" inherently exists when the employer (which is naturally interested in keeping its costs for pension benefits at a minimum) also acts as administrator or trustee of a pension plan. However, ERISA contemplates and approves of such an arrangement in certain circumstances by providing that one may serve as a fiduciary in addition to being an officer, agent or other representative of an employer. 29 U.S.C. § 1108(c)(3). *See Donovan v. Bierwirth*, 538 F. Supp. 463, 468 (E.D.N.Y. 1981), *aff'd as modified (on other grounds)*, 680 F.2d 263 (2nd Cir. 1982), *cert. denied*, ____U.S.____, 103 S.Ct. 488 (1983). *Flinchbaugh v. Chicago Pneumatic Tool Co.*, 531 F. Supp. 110 (W.D. Pa. 1982). When acting on behalf of the pension fund, there is no doubt that a fiduciary having such "dual loyalty" must act solely to benefit participants and beneficiaries. However, it is the Court's opinion here that when a corporate

employer negotiates the terms of sale of a division, whose employees are participants in a pension plan, the negotiations that affect the terms and conditions of future pension benefits (at least those that are not protected by ERISA's vesting and non-forfeitability provisions), do not implicate fiduciary duties as to the pension fund. Such negotiations are distinct from actually administering a plan and conducting transactions affecting the monies and property of the plan's fund. In other words, the mere fact that a company has named itself as pension plan administrator or trustee does not restrict it from pursuing reasonable business behaviour in negotiations concerning pension benefits not otherwise affected by the requirements of ERISA. *See N.L.R.B. v. Amax Coal Co.,* 453 U.S. 322, 333 n. 16 (1981). When the terms of the pension agreement are negotiated by a labor organization and the employer and ultimately controlled by a collectively bargained agreement, as here, the distinction between administering the pension program (under a fiduciary duty) and creating or amending the program through negotiations is even more clear. *See UMWA Health & Retirement Funds v. Robinson,* 455 U.S. 562 (1982).[3]

Even if a fiduciary duty were to be imposed on a corporate employer in such a situation, the Court would have to find that no duty was violated here. The Court earlier concluded that the proposed amendments do not deprive any Plaintiff of a vested or non-forfeitable benefit. The Court also concluded the

---

[3] As earlier mentioned, the corporate pension agreement specifies that the pension plan is administered by a committee of designated National employees and that most of the assets of the plan are held by a trust fund, managed and held by a separate entity. It has occurred to the Court that since the people actually administering the pension fund may not be at all involved in the negotiations for the sale of the Weirton Division, no breach of fiduciary duty under 29 U.S.C. § 1104 would arise because of a division of labor within the corporation. However, the issues before the Court were framed to test National's participation in the events surrounding the proposed sale as a corporate entity.

amendments proposed are reasonable under the circumstances. Finally, the Court would conclude that since all employees of the Weirton Division (not just those covered by the pension agreement at issue) would be equally affected by the proposed changes, there is no discrimination. On the facts presented here, the action of National Steel in negotiating the terms of sale that affect ancillary pension benefits was neither arbitrary or capricious, nor has there been a showing of bad faith.

In conclusion, the Court finds that the terms of sale proposed to amend the 70/80 and rule of 65 retirement provisions of the pension agreement between National Steel and the Independent Steelworkers Union do not violate provisions of ERISA relating to vesting, accrued benefits, or non-forfeitability; do not violate provisions of ERISA relating to prohibited transactions; do not violate provisions of ERISA relating to fiduciary duties imposed upon National Steel or the pension plan, and do not violate provisions of the existing pension or collective bargaining agreements. The Court earlier found that the terms of sale do not violate other provisions of labor law.

SEVERANCE PAY ISSUES

The current collective bargaining agreement between National Steel Corporation, Weirton Steel Division, and Defendant Union and its members who are production, maintenance, and hourly-rated plant clerical employees includes a provision for severance pay. In brief, a severance allowance is payable to employees who have accumulated three or more years of service when the company permanently closes a department or substantial portion thereof and the employment of individuals is terminated, either directly or indirectly, as a result of the department closure. There are exceptions to the severance allowance if the employee accepts an offer of a job in another department or is offered a job of the same job class in the same department or requests a lower job class job in the same department, etc. Payment of severance benefits in certain circumstances may af-

fect other benefits from the company. (E.g., Payment of severance allowance may be deducted from pension benefits.)

In the *Brunner* complaint, it is alleged that the agreement that the sale of Weirton Division to a newly-formed, employee-owned corporation will not trigger Defendant National Steel's obligation to make severance payments to employees is either a breach of Defendant Union's fiduciary obligations or duty of fair representation. (Complaint §§ 44, 45, 46.) The amended complaint in the *Sutton* matter does not mention severance pay until the prayer for relief. It is therefore difficult, perhaps impossible, to determine the basis for challenge in that civil action. Based upon the pleadings, the motion for summary judgment under consideration, and other matters of record, the severance pay issue may be properly stated as follows: Whether a sale by an existing employer to another employer, without more, should trigger an obligation of the existing employer to pay severance benefits. Since both the *Brunner* and *Sutton* complaints state rather sweeping allegations of violations of ERISA, the Court will consider the issue both as to ERISA and the labor law duties of unions.

In general, a severance allowance is payment by an employer to an employee on termination of the employee's employment. Black's Law Dictionary, 1232 (5th ed. 1979). Such payment is beyond wages and is usually designed to ease the employee's financial burdens while looking for a new job. *See Owens v. Press Publishing Co.*, 20 N.J. 537, 120 A.2d 442 (1956).

Though not a retirement benefit, severance pay does come within the reach the ERISA as an "employee welfare benefit plan." 29 U.S.C. §§ 1002(1) (citing 29 U.S.C. § 186 and the benefits described therein), 1002(2)(B). Though the "vesting" provisions of ERISA (which mainly apply to pension plans) do not apply, other protective provisions of ERISA do apply, such as the safeguards against discrimination, 29 U.S.C. § 1140, and violation of fiduciary duties, 29 U.S.C. § 1104. *Calhoun v. Falstaff Brewing Co.*, 478 F. Supp. 357 (E.D. Mo. 1979).

Federal courts frequently look to the contract language of severance pay benefits as a guide in determining whether violations have occurred. *See, e.g., Donnelly v. Aetna Life Ins. Co.*, 465 F. Supp. 696 (E.D. Pa. 1979).

Unlike some severance pay provisions in collective bargaining agreements, the one at issue here does not set forth a purpose. Instead, Article XIV of the collective bargaining agreement merely sets forth conditions, eligibility, methods of determining the allowance, and other administrative provisions. However, one can easily determine that the benefit is designed to aid those whose employment is terminated.

Both the *Brunner* and *Sutton* actions challenge the proposed terms of sale between National Steel and a new employee-owned corporation. Thus the issue here is limited to whether the sale, without more, should trigger severance benefits. The Court is satisfied that the proposal to amend the severance benefit provisions of the collective bargaining agreement to preclude payment of severance allowances solely on the basis of the transfer of ownership violates neither ERISA nor the terms of the agreement as currently written. Simply put, the fundamental bases for this benefit are not necessarily put into play by such a transfer; namely, the permanent closure of a department or substantial portion thereof, and the termination of employment as a direct or indirect result.

The testimony adduced at hearings thus far and several of the documents submitted as exhibits lead the Court to believe that all, or a substantial majority of all, the active employees of National's Weirton Steel Division will be offered an opportunity to go to work for the proposed employee-owned company. It can be said with certainty that any employee of National Steel who becomes employed by the new employer following the transition of ownership is not entitled to a severance allowance under the contract or under ERISA. *Pinto v. Zenith Radio Corp.*, 480 F. Supp. 361 (N.D. Ill. 1979), *aff'd*, 618 F.2d 110 (7th Cir. 1980) (table). Also, the agreement in principle containing the terms of

sale from National Steel states that National will remain liable for outstanding and unrevealed severance pay claims. To say that any present employee of National at Weirton, either active or on layoff, will have a valid severance allowance claim that will be denied is purely speculative and it cannot be said that the existing Plaintiffs in *Sutton* and *Brunner* would be proper parties to such claims.

In large measure, the reasoning of the Court with regard to prohibited transactions and other fiduciary duties of National Steel under ERISA for pension benefit issues apply equally to severance pay issues. Because no activity affecting the fiscal assets of a welfare benefit plan is implicated with the proposed amendments to severance allowance provisions in the agreement, 29 U.S.C. § 1106 (prohibited transactions) cannot apply. Indeed, the funding requirements of ERISA do not even apply to employee welfare benefits plans such as a severance pay benefit, 29 U.S.C. §1081, and there is no "fund" or group of assets subject to the prohibited transaction provisions. Because severance pay benefits are not subject to ERISA's vesting and non-forfeitability requirements, there can be no breach of fiduciary duty on the part of any party for proposing a limit to such benefits on the basis that some "vested" right is curtailed. The distinction between a corporate fiduciary duty when administering a benefit plan and corporate activities in connection with negotiating changes in a benefit plan which were enunciated with regard to pension issues is applicable to this discussion of severance pay benefits. Therefore, there has been no violation of an ERISA-based fiduciary duty with regard to the proposed severance pay amendment.

In conclusion, the Court finds that the terms of sale proposed to amend the severance allowance provisions of the collective bargaining agreement between National Steel and the Independent Steelworkers Union do not violate provisions of ERISA relating to vested, accrued benefits or non-forfeitability; do not violate provisions of ERISA relating to prohibited transactions;

do not violate provisions of ERISA relating to fiduciary duties, and do not violate provisions of the existing collective bargaining agreement. The Court earlier found that the terms of sale do not violate other provisions of labor law.

THE MOTION TO DELAY CONSIDERATION

Counsel for Plaintiffs in these cases have filed a motion to delay consideration of National's motion for (partial) summary judgment until further discovery is completed.

Because the ruling of the Court is limited to issues surrounding the agreement in principle, as amended, which announced the terms of sale between National and a proposed company; and because the Court, for purposes of this Opinion and Order, has considered Plaintiffs' characterization of National's motivation for sale of the Weirton Division as true, there is no need to delay a ruling on the issues as framed. Therefore, Plaintiffs' motion will be denied in part.

There are other issues raised by the complaints not reached herein. These include claims that additional pension supplements have been given to certain employees upon demand, but denied to Plaintiffs (*Sutton* complaint § 190), that Defendant Independent Steelworkers Union has acted through unlawfully elected officers (*Sutton* complaint § 210), and the earlier mentioned claims embodied in charges of unfair labor practices pending before the NLRB. As to the remaining issues, further discovery may be necessary. Provided the discovery is accomplished within the framework established by the Federal Rules of Civil Procedure and the Local Rules of this Court, Plaintiffs' motion will be granted in part.

ORDER

The foregoing constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure. Upon the reasoning and conclusions herein, it is

ORDERED that the motion of Defendant National Steel Corporation for partial summary judgment on the issues earlier delineated is GRANTED. It is further

ORDERED that the motion of Plaintiffs' to delay consideration of National's motion for summary judgment is DENIED in part, and GRANTED in part, as earlier delineated.

Additionally, there are many other issues raised and suggested by the complaints in *Brunner* and *Sutton* which are not resolved to date. The Court will look to counsel for the various parties to begin proceedings which will mature these matters for speedy disposition.

ENTER: July 8th, 1983.

/s/ Robert E. Maxwell
United States District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
Attest: Thomas F. Stafford, Clerk, U.S. District Court
Northern District of West Virginia

/s/ Sue O. Abraham
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1567
No. 83-2003

Eugene R. Sutton; Raymond Ludewig; Paul D. Alexander; Anthony J. Angelo; John P. Barlas; Thomas V. Barnhouse; William Bell; Walter Birrell; Pete Brier and Camden Bumgarner, et al.,

Appellants,

v.

Weirton Steel Division of National Steel Corporation; Independent Steel Workers Union and Pension Agreement between the National Steel Corporation and the Independent Steelworkers Union,

Appellees.

No. 83-1569
No. 83-1895

Gerald W. Brunner; Clarence Rifkee; Norman Clark; James Hoge and all others similarly situated,

Appellants,

v.

National Steel Corporation; Independent Steel Workers Union; Weirton Joint Study Committee, Inc. and Pension Agreement between National Steel Corporation and the Independent Steelworkers Union,

Appellees.

No. 83-2004

Edward Dhayer; Edward Bittner; Richard Blancato and James H. Browning, et al.,
Appellants,

v.

Weirton Steel Division of National Steel Corporation and Independent Steelworking Union,
Appellees.

Appeals from the United States District Court for the Northern District of West Virginia, at Wheeling. Robert E. Maxwell, Chief Judge.

Argued December 7, 1983 Decided December 30, 1983

Before PHILLIPS and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Barry Laine (Anthony P. Sgambati, II, David Roloff, Green Schiavoni, Murphy, Haines & Sgambati Co. L.P.A. on brief) and John Randolph Spon, Jr. (Keith A. Fournier, Spon & Fournier on brief) for appellants; Carl H. Hellerstedt, Jr. (Joseph Mack, III, Brian J. Dougherty, Thorp, Reed & Armstrong on brief); David L. Robertson (William Kiefer, Peter Rich, Bogard & Robertson on brief); Anthony F. Phillips (Gerald Kerner, Brian E. O'Connor, Laurence H. Lenz, Jr., Willkie Farr & Gallagher on brief) for appellees.

BETZNER, Senior Circuit Judge:

This appeal of consolidated cases arises out of an agreement by National Steel Corp. to sell its Weirton Steel Division to a new company, Weirton Steel Corp., which is owned by the Division's employees. The district court granted partial summary judgments in favor of National, its Retirement Program, and the Independent Steelworkers Union.* Finding no just reason for delay, it entered final judgment pursuant to Federal Rule of Civil Procedure 54(b) on the issues that it had considered. The appellants, a minority of the employees at the Division, assert that the district court erred by holding that National did not violate the Employee Retirment Income Security Act (ERISA), that the Union did not breach its duty of fair representation, that class certification was inappropriate, and that the appellants were not entitled to injunctive relief.

We find no cause for reversal in these assignments of error and affirm the judgments of the district court.

I

In March 1982, National announced that it would reduce capital expenditures, production capacity, and employment at the Division. It also said it would consider a sale of the Division. The Weirton Joint Study Committee, Inc., was then established to study the possibility of forming a corporation owned by employees to purchase the Division. The committee included five representatives of management, twenty-one representatives of the Independent Steelworkers Union, and three representatives of the Independent Guard Union. The committee retained legal counsel and commissioned consultants to make a feasibility study. It also engaged other firms to assist with aspects of the proposed transaction requiring particular expertise.

---

* Dhayer v. Weirton Steel Division of National Steel Corp., 571 F. Supp. 316 (N.D. W.Va. 1983); Sutton v. Weirton Steel Division of National Steel Corp., 567 F. Supp 1184 (N.D. W.Va. 1983).

The agreement of sale provided for modification of pension and severance benefits contained in the collective bargaining agreements for union employees and in National's retirement program and personnel policies for salaried nonunion employees. These benefits and the amendments are essentially the same for all employees. Union members approved the changes in the bargaining agreements and other terms of sale. National unilaterally changed its program and policies for nonunion members.

The benefits and the amendments affecting them are fully described in the opinions of the district court. For the purposes of this appeal they can be recapitulated as follows. All workers, whether they choose to work for the new company or not, will retain the normal retirement benefits earned through service with National before the sale. National will segregate all assets attributable to the Division and establish a separate trust available to pay normal retirement benefits to past and present Division employees. The new company will be responsible for benefits accrued after the change in ownership. When an employee who has worked at both companies retires, his years of service will be aggregated, and he will receive benefits from National and the new company in proportion to his service for each.

In addition to normal retirement benefits, National provided early retirement benefits and severance pay in the event of shutdown or layoff for employees with the requisite combination of age and years of employment. For convenience, we will refer to these benefits and severance pay collectively as contingent benefits. These benefits were not funded. They were payable, if at all, from National's corporate treasury. The agreement stipulates that the sale of the Division will not trigger payment of the contingent benefits. National, however, will remain liable for the shutdown benefits if within five years of the sale Weirton Steel closes. Contingent benefits similar to those formerly available at National will be provided by the new company.

The appellants protest the agreement to eliminate National's obligation for the contingent benefits upon the sale of the Division. It is their position that, regardless of their immediate employment by the new company, their status as employees of National will be terminated by the sale. In the absence of the agreement, they insist, the sale would entitle them to the contingent benefits. They point out that the shutdown benefits alone, without the severance pay, would aggregate approximately $300,000,000 and that National has avoided this liability.

II

Summary disposition of the issues presented in this appeal was appropriate. All of the material facts, save one, were established by uncontradicted evidence. To fill the hiatus occasioned by the single dispute over a genuine issue of fact, the district court accepted as proved the allegations that National's sole motivation for the sale was avoiding future pension obligations. *See Dhayer*, 571 F. Supp. at 326; *Sutton*, 567 F. Supp. at 1198.

Though permitted by 29 U.S.C. § 1108(c)(3) to serve as an administrator of its pension plan, National's fiduciary obligations were not diminished by its dual role. Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982). National was required to discharge its fiduciary duties "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). ERISA's requirements "insulate the trust from the employer's interest," and, consequently, National was not permitted to assume a position where it had "dual loyalties" in the administration of the plan. NLRB v. Amax Coal Co., 453 U.S. 322, 333-34 (1981).

By retaining liability for all normal retirement benefits and establishing a separate trust for their payment, National did not violate any provision of ERISA or any fiduciary obligation with respect to accrued benefits, which under the plan were payable

at age 65. The critical question, therefore, is whether ERISA imposes any fiduciary obligations to maintain the contingent benefits about which the appellants complain. If it does, summary judgment was inappropriate, because in avoiding the payments through sale of the Division, National's self-motivation, which the district court assumed for the purpose of this proceeding, cannot be reconciled with its fiduciary duties. On the other hand, if ERISA does not impose an obligation on National to maintain the contingent benefits, National in its capacity as an employer could undertake to eliminate them.

Under ERISA's vesting rules, only accrued benefits must be nonforfeitable. 29 U.S.C. § 1053(a). With respect to the issues raised by these appeals, ERISA defines an accrued benefit as an "annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23). The accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments. The Act was not designed to prohibit modification of these ancillary benefits. *See* H.R. Conf. R. No. 1280, 93d Cong., 2d Sess. 273, *reprinted in* 1974 U.S. Code Cong., 2d Sess. 60-61, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4726. Rather, Congress believed that the "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 4935. An employer may change such benefits without violating ERISA. *See* Fentron Industries, Inc. v. National Shopmen Pension Fund, 674 F.2d 1300, 1306 (9th Cir. 1982). *But cf.* Dependahl v. Falstaff Brewing Corp., 491 F. Supp. 1188, 1196-97 (E.D. Mo. 1980), *modified*, 653 F.2d 1208 (8th Cir. 1981). Any right to payment of benefits before normal retirement age must be found in pertinent employment agreements. Fine v. Semet, 699 F.2d 1091, 1093 (11th Cir. 1983). Consequently, National, in its capacity as an employer, did not violate ERISA.

Also, National, in its capacity as a fiduciary, did not violate ERISA. Congress authorized an employer to administer its pension plan, and in the discharge of its duties with respect to the plan, the employer must satisfy the exacting fiduciary standards imposed by ERISA. Congress, however, has not prohibited an employer who is also a fiduciary from exercising the right accorded other employers to renegotiate or amend, as the case may be, unfunded contingent benefits payable before normal retirement age. The changes, accomplished in this manner, are not to be reviewed by fiduciary standards.

These conclusions are sustained by United Mine Workers Health and Retirement Funds v. Robinson, 455 U.S. 562, 573-76 (1982). *Robinson* dealt with the fiduciary obligations imposed by § 186, on trustees of a fund for employee benefits. Nevertheless, it is pertinent because the high fiduciary standards exacted by both the Labor Act and ERISA are essentially the same. In *Robinson*, benefits created by the collective bargaining agreement were changed by renegotiation. The Court held that the changes were not to be reviewed under fiduciary standards, cautioning: "[W]hen neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract." 455 U.S. at 576.

III

In addition to the general fiduciary standards imposed by § 1104, Congress also prohibited fiduciaries from engaging in certain specified conduct, including transferring assets for their own account, and acting in any capacity in a transaction involving the plan on behalf of a party whose interests are adverse to the plan. 29 U.S.C. § 1106. *See* NLRB v. Amax Coal Co., 453 U.S. 322, 332-34 (1981). The appellants assert that the district court erred by holding that National did not violate these provisions of § 1106. They base their argument on two premises: first, that National's liability for the contingent benefits was an

asset of the plan; and, second, that National illegally caused the plan to relinquish this asset by agreeing that the sale would not trigger payment of the contingent benefits. The appellants support their argument by the affidavit of an actuary who expressed the opinion that National's liability was an asset of its pension fund.

It may well be that a prudent actuary would consider National's contingent liability in evaluating its total potential liability for benefits in view of the domestic steel market. Certainly responsible management would want to know the magnitude of its exposure if the plant were shut down. But the actuary's opinion is not proof that National's contingent liability is an asset of the plan within the meaning of ERISA. No provision of the Act requires this contingent liability to be funded as an asset of the plan. The parties recognize that if National should become liable for the contingent benefits, the pension fund, which is dedicated to the payment of normal retirement benefits, cannot be diverted for this purpose. *See* Cutaiar v. Marshall, 590 F.2d 523, 528-30 (3d Cir. 1979). The only source of payment would be the company's treasury. National in its capacity as the manager of its business can use its corporate treasury for general corporate business. Conversely, in its capacity as a fiduciary, National is not required by ERISA to account for expenditures from its corporate treasury that are disbursed for general corporate purposes.

National has not caused the benefit plan to engage in a transaction with respect to the contingent benefits. The benefit plan covers the employees of several divisions. The segregation of assets available for normal retirement of Division employees and the establishment of a separate trust for this purpose is in essence a bookkeeping transaction. No funds held by the pension plan will be depleted or recouped by the company because of the agreement not to trigger the contingent benefits.

In short, ERISA does not impress a trust upon National's corporate treasury for the payment of the contingent benefits.

The appellants have cited no case in support of their position. It is the unfunded nature of National's contingent liability that distinguishes this case from the cases, on which the appellants rely, where courts have found that fiduciaries have violated § 1106. *See, e.g.*, Cutaiar v. Marshall, 590 F.2d 523 (3d Cir. 1979); McDougall v. Donovan, 552 F.Supp. 1206, 1212-16 (N.D. Ill. 1982). Accordingly, we conclude that the district court correctly ruled that National did not violate § 1106.

IV

The district court held that undisputed evidence established that the Independent Steelworkers Union did not breach its duty of fair representation by agreeing to the terms of sale. The appellants assign error to this aspect of the court's judgment on both substantive and procedural grounds.

The union had a statutory duty to represent fairly all of the Division employees in its bargaining with National. Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953). To establish a breach of the duty of fair representation, the appellants must show that the union's conduct was arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967).

Confronted with the prospect of the loss of several thousand jobs, the union through the Joint Committee participated in negotiating the Division's sale. The union relied on the advice of expert consultants. It agreed to the terms of sale only after its members had ratified the changes in the bargaining agreement that are the subject of the appellants' complaint. The agreement treats all union members equally, although it has an immediate effect on the appellants, who have sufficient service to qualify for the contingent benefits.

It is inevitable in the give-and-take of collective bargaining that some employees will fare worse than others. But a union may compromise to achieve long-term advantages, even though individual employees may be affected differently by the

resulting agreement. *See* Humphrey v. Moore, 375 U.S. 335, 349-50 (1964); *Ford Motor,* 345 U.S. at 338; Ekas v. Carling Nat'l Breweries, Inc., 602 F.2d 664, 667 (4th Cir. 1979). In concert with the district court, we hold that the evidence conclusively establishes that the union's conduct was not arbitrary, discriminatory, or in bad faith. Consequently, the union did not breach its duty of fair representation.

The appellants also contend that the court committed procedural error by granting summary judgment to the union without a pending motion under rule 56 and without affording them the notice and protection afforded by rules 12(b)(6) and 56. They also protest the court's denial of further discovery.

Ordinarily an assignment of error similar to the appellants' would dictate vacating the district court's judgment. But considering the procedures followed in this case and the voluminous evidence the parties presented, we find no error that survives application of the harmless error provisions of rule 61. The trial court consolidated these cases for hearing, briefing, and argument. It denied the union's motion for judgment on the pleadings without reaching the merits of the motion. Instead, the court noted the relationship between the alleged illegal conduct of both National and the union, and it indicated that these issues must be considered together. At the direction of the court, all parties filed statements of issues, which included the question of the union's representation. This question was again raised in National's motion for summary judgment. Consequently, we are satisfied that the appellants had ample notice and full opportunity to participate without prejudice in the procedure that the court subsequently followed in granting summary judgment.

V

In view of our conclusions about the principal issues raised by the appellants, the remaining assignments of error require no

discussion. The district court did not err by dismissing pendent state claims or by denying class certification and injunctive relief.

The judgments of the district court are affirmed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 83-40-W

Gerald W. Brunner, Clarence Riffee, Norman Clark, James Hoge, and all others similarly situated,
Plaintiffs,

v.

National Steel Corporation, Independent Steelworkers Union, Weirton Joint Study Committee, Inc., and Pension Agreement between the National Steel Corporation and the Independent Steelworkers Union,
Defendants.

FINAL JUDGMENT AS TO CERTAIN CLAIMS
(Filed Sept. 15, 1983)

ORDERED, ADJUDGED AND DECREED, that:

1. The terms of sale proposed to amend the 70/80 and Rule-of-65 retirement provisions of the pension agreement between National Steel Corporation and the Independent Steelworkers Union to the effect that the sale of assets of the Weirton Steel Division of National Steel Corporation to the Weirton Steel Corporation does not constitute an event giving rise to entitlement to, or eligibility for 70/80 or Rule-of-65 retirement benefits, or constitute the lack of suitable long term employment, does not violate:

(a) Provisions of ERISA (29 U.S.C. §1106) relating to prohibited transactions;

(b) Provisions of ERISA (29 U.S.C. §1104) relating to fiduciary duties imposed upon National Steel Corporation or the National Steel Corporation Retirement Program;

(c) Provisions of ERISA (29 U.S.C. §§*1002 et. seq., 1056(a) and 1053) relating to vested accrued benefits or nonforfeitable benefits;*

(d) Provisions of the pension agreement or collective bargaining agreement as enforceable pursuant to 29 U.S.C. §185, or

(e) Provisions of the federal labor laws (29 U.S.C. §185, as developed federal common law) by reason of National Steel Corporation and the Independent Steelworkers Union acting in concert to implement the amendments to the pension agreement, including, as to defendant Independent Steelworkers Union, the duty of fair representation in agreeing to propose such amendments to its membership for vote.

2. The terms of sale proposed to amend the severance allowance provisions of the collective bargaining agreement between National Steel Corporation and the Independent Steelworkers Union to the effect that the sale of assets of the Weirton Steel Division of National Steel Corporation to the Weirton Steel Corporation does not constitute an event giving rise to entitlement to, or eligibility for severance allowance does not violate:

(a) Provisions of ERISA (29 U.S.C. §1106) relating to prohibited transactions;

(b) Provisions of ERISA (29 U.S.C. §1104) relating to fiduciary duties imposed upon National Steel Corporation;

(c) Provisions of ERISA (29 U.S.C. §§1102 et. seq., 1056(a), and 1053) relating to vested accrued benefits or nonforfeitable benefits;

(d) Provisions of the collective bargaining agreement as enforceable pursuant to 29 U.S.C. §185, or

(e) Provisions of the federal labor laws (29 U.S.C. §185 as developed as federal common law) by reason of National Steel Corporation and the Independent Steelworkers Union acting in concert to implement the amendment to the collective bargaining agreement, including, as to defendant Independent Steelworkers Union, the duty of fair representation in agreeing to propose such amendments to its membership for vote.

APPROVED/

ENTER: September 14th, 1983.

/s/ Robert E. Maxwell
United States District Judge

ENTER: September 15, 1983.

/s/ Thomas F. Stafford
Clerk of Court

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

No. 83-1569

Gerald W. Brunner; Clarence Rifkee; Norman Clark; James Hoge and all others similarly situated,

Appellants,

v.

National Steel Corporation; Independent Steelworkers Union; Weirton Joint Study Committee, Inc. and Pension Agreement Between the National Steel Corporation and the Independent Steelworkers Union,

Appellees.

Appeal from the United States District Court for the Northern *District of* West Virginia

This cause came on to be heard on the record from the United States District Court for the Northern *District of* West Virginia, *and was argued by counsel.*

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate II
Clerk

Filed December 30, 1983

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

No. 83-1895

Gerald W. Brunner; Clarence Rifkee; Norman Clark; James Hoge and all others similarly situated,

Appellants,

v.

National Steel Corporation; Independent Steelworkers Union; Weirton Joint Study Committee, Inc. and Pension Agreement Between the National Steel Corporation and the Independent Steelworkers Union,

Appellees.

Appeal from the United States District Court for the Northern *District of* West Virginia

This cause came on to be heard on the record from the United States District Court for the Northern *District of* West Virginia, *and was argued by counsel.*

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate II
Clerk

Filed December 30, 1983

APPENDIX E

29 U S C SECTION 185

§185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent—Entity for purposes of suit—Enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purpose of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

APPENDIX F

29 U S C SECTION 1001

§1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds

have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle A, § 2, 88 Stat. 832)

APPENDIX G

29 U S C SECTION 1104

§1104. Fiduciary duties

(a) Prudent man standard of care. (1) Subject to sections 403(c) and (d) [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 USCS § 1107(d)(3)], the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 USCS § 1107(d)(4) and (5)]).

(b) Indicia of ownership of assets outside jurisdiction of district courts. Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary. In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 404, 88 Stat. 877; Sept. 26, 1980, P. L. 96-364, Title III, § 309, 94 Stat. 1296.)

APPENDIX H

29 U S C SECTION 1106

§1106. Prohibited transactions

(a) Transactions between plan and party in interest. Except as provided in section 408 [29 USCS § 1108]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;
(B) lending of money or other extension of credit between the plan and a party in interest;
(C) furnishing of goods, services, or facilities between the plan and a party in interest;
(D) transfer to, or use by or for the benefit of, a party in interest of any assets of the plan; or
(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 USCS § 1107(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 USCS § 1107(a)].

(b) Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,
(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or repre-

sent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real property to plan by party in interest. A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 406, 88 Stat. 879.)

APPENDIX I

29 U.S.C. SECTION 1108

§ 1108. Exemptions from prohibited transactions

(a) Grant of exemptions. The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or port of the restrictions imposed by sections 406 [29 USCS § 1106] and 407(a) [29 USCS § 1107(a)]. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this Act. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,
(2) in the interests of the plan and of its participants and beneficiaries, and
(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 406(a) [29 USCS § 1106(a)] or 407(a) [29 USCS § 1107(a)], the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 406(b) [29 USCS § 1106(b)] unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from 29 USCS § 1106 prohibitions. The prohibitions provided in section 406 [29 USCS § 1106] shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees, officers, or shareholders in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 407(d)(6) [29 USCS §1107(d)(6)]), if—

> (A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and
>
> (B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 407(d)(5) [29 USCS § 1107(d)(5)]).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

> (A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or
(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations writtem by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company. or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan

is such assets are distributed in the same manner as provided under section 4044 of the Act [29 USCS § 1344] (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of title IV [29 USCS §§ 1381 et seq.].

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 [29 USCS § 1411].

(c) Fiduciary benefits and compensation not prohibited by 29 USCS § 1106. Nothing in section 406 [29 USCS § 1106] shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already recives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(d) Owner-employees; family members; shareholder employees. Section 407(b) [29 USCS § 1107] and subsections (a), (b), (c), and (e) of this section shall not apply to any transaction in which a plan, directly or indirectly—

(1) lends any part of the corpus or income of the plan to;
(2) pays any compensation for personal services rendered to the plan to; or
(3) acquires for the plan any property from or sells any property to;

any person who is with respect to the plan an owner-employee (as defined in section 401(c)(3) of the Internal Revenue Code of 1954 [26 USCS § 401(c)(3)]), a member of the family (as defined in section 267(c)(4) of such Code [26 USCS § 267(c)(4)]) of any such owner-employee, or a corporation controlled by any such owner-employee through the ownership, directly or indirectly, of 50 percent or more of the total combined voting power of all classes of stock of the corporation. For purposes of this subsection a shareholder employee (as defined in section 1379 of the Internal Revenue Code of 1954 [26 USCS § 1379]) and a participant or beneficiary of an individual retirement account, individual retirement annuity, or an individual retirement bond (as defined in section 408 or 409 of the Internal Revenue Code of 1954 [26 USCS §§ 408 or 409]) and an employer or association of employers which establishes such an account or annuity under section 408(c) of such code [26 USCS § 408(c)] shall be deemed to be an owner-employee.

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property. Sections 406 and 407 [29 USCS §§ 1106 and 1107] shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5) [29 USCS § 1107(d)(5)]) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 407(d)(4) [29 USCS § 1107(d)(4)])—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under Section 407(e)(1) [29 USCS § 1107(e)(1)]),
(2) if no commission is charged with respect thereto, and
(3) if—

(A) the plan is an eligible individual account plan (as defined in section 407(d)(3) [29 USCS § 1107(d)(3)]), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 407(a) [29 USCS § 1107(a)].

(f) Applicability of statutory prohibitions to mergers or transfers. Section 406(b)(2) [29 USCS 1106(b)(2)] shall not apply to any merger or transfer described in subsection (b)(11).

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 408, 88 Stat. 883; Sept. 26, 1980, P. L. 96-364, Title III, § 308, 94 Stat. 1295.)

APPENDIX J

29 U S C SECTION 1132

§1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions. (1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 [26 USCS §§ 401(a), 403(a), or 405(a)] (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respct [respect] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 USCS §§ 1051 et seq., §§ 1081 et seq.] (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 USCS § 1145].

(c) Administrator's refusal to supply requested information. Any administrator who fails or refuses to comply with a request for any information which such administrator required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity. (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions. (1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 USCS § 1145] in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorey's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954 [26 USCS § 6621].

(h) Service upon Secretary of Labor and Secretary of the Treasury. A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his

discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [29 USCS §§ 1101 et seq.]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty. In the case of a transaction prohibited by section 406 [29 USCS § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of the Internal Revenue Code of 1954 [26 USCS § 4975(f)(4)]; except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of such Code [26 USCS § 4975(f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more that 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 USCS § 4975(e)(1)].

(j). Direction and control of litigation by Attorney General. In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code [28 USCS § 518(a)]), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of action against Secretary of Labor. Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the

United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 5, § 502, 88 Stat. 891; Sept. 26, 1980, P. L. 96-364, Title III, § 306(b), 94 Stat. 1295.)

APPENDIX K

FEDERAL RULES OF CIVIL PROCEDURE, RULE 56

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated On Motion. If on motion under this rule judgment is not rendered upon the whole case or

for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without subtantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, as adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.